SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 7 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1128

CONSOLIDATED COPPERSTATE LINES,
Appellant,

vs.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; ARKANSAS-BEST FREIGHT SYSTEM, INC.; GORDONS TRANSPORTS, INC.; BRASWELL MOTOR FREIGHT LINES, INC.; CENTRAL FREIGHT LINES, INC.; RED BALL MOTOR FREIGHT, INC.; SAIA MOTOR FREIGHT LINES, INC.; HERRIN TRANSPORTATION CO.; AND RYDER TRUCK LINES, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

JURISDICTIONAL STATEMENT.

DAVID AXELROD,
ARNOLD L. BURKE,
LEONARD R. KOFKIN,
39 South La Salle Street,
Chicago, Illinois 60603,
Counsel for Consolidated Copperstate Lines, Inc., Appellant.

INDEX.

	PAGE
Jurisdictional Statement	1
Opinion Below	2
Jurisdiction	2
Statutes Involved	3
Questions Presented	3
Statement of the Case	4
Questions Are Substantial	6
A. Judicial Review of Agency Action	6
B. Argument	9
1. Commission Acted Arbitrarily in Compartmentalizing and Segregating Evidence and Thereby Refusing to Consider All Relevant Evidence Introduced in Deciding Issues Raised in Section 5 and 207 Applications	9
2. Commission Erroneously Relied Upon Expertise to Achieve a Result Inconsistent With Its Prior Decisions. Scope of Judicial Review of Commission's Decisions Permits Courts to Review Such Actions Because for Agencies to Adopt Different Standards for Similar Situations Is to Act Arbitrarily	12
Conclusion	15
Proof of Service	16
Appendix A—Opinion of the Court Below	Appendix page 1
Appendix B—Decision of Interstate Commerce Commission	Appendix page 6
Appendix C—Recommended Report and Order of ICC Hearing Examiner	Appendix page 53
Appendix D—Order of ICC Denying Appellant Petition for Reconsideration	Appendix page 238

TABLE OF CASES.

Acme Cartage Company, et al. v. United States, et al., 290 F. Supp. 453 13

American Trucking Associations, Inc. v. United States, et al., 364 U. S. 1 ..... 2, 11

Atlas Van Lines, Inc.—Control and Merger—, 75 M. C. C. 175 14

Braswell Freight Lines, Inc.—Purchase—Shayler, 101 M. C. C. 1 14

Bowman Transportation, Inc.—Control and Merger—A. W. Hawkins, Inc., 93 M. C. C. 133 14

Burlington Truck Lines, Inc., et al. v. United States, et al., 371 U. S. 156 ..... 2, 8

Consolidated Freightways Corporation of Delaware—Control—Southern Plaza Express, Inc., 104 M. C. C. 194 ..... 3, 8, 9, 12

Gilbertsville Truck Company v. U. S., 371 U. S. 115 14

M. & M. Transportation Co. v. United States, et al., 350 U. S. 857 2

McLean Trucking Company v. U. S., 321 U. S. 67 (1944) 9

Midwest Emery Freight System, Inc.—Control and Merger—Interstate Truck Service, Inc., 101 M. C. C. 19 14

NLRB v. Mall Tool Company, 119 F. 2nd 700 12

National Transportation Company—Purchase (Portion)—Hartford Transportation Company, 97 M. C. C. 200 14

New York Federal Securities Corporation v. U. S., 287 U. S. 12 (1932) 9

Overnite Transportation Company—Purchase—Rutherford Freight Lines, Inc., 97 M. C. C. 568..... 14

Pirkle—Purchase—P&H Refrigerated Express, Inc., 90 M. C. C. 36..... 14

Shaffer Transportation Company v. United States, et al., 355 U. S. 83..... 2

Trans American Freight Lines, Inc.—Purchase—Gorman, 5 M. C. C. 712..... 14

U. S. v. J. T. Transport Co., 368 U. S. 81..... 11

STATUTES CITED.

Administrative Procedure Act:
Section 10(e) (49 U. S. C. 1009(e))..... 3

Interstate Commerce Act:
Section 5 (49 U. S. C. 5).....2, et seq.
Section 205(g) & (h) (49 U. S. C. 305(g) & (h))..2
Section 207 (49 U. S. C. 307).....3, et seq.

Judicial Code:
28 U. S. C. 1336..... 2
28 U. S. C. 1398..... 2
28 U. S. C. 2284..... 2
28 U. S. C. 2321 et seq..... 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. .....

CONSOLIDATED COPPERSTATE LINES,
Appellant,

vs.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; ARKANSAS-BEST FREIGHT SYSTEM, INC.; GORDONS TRANSPORTS, INC.; BRASWELL MOTOR FREIGHT LINES, INC.; CENTRAL FREIGHT LINES, INC.; RED BALL MOTOR FREIGHT, INC.; SAIA MOTOR FREIGHT LINES, INC.; HERRIN TRANSPORTATION CO.; AND RYDER TRUCK LINES, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

JURISDICTIONAL STATEMENT.

Appellant, Consolidated Copperstate Lines (Copperstate) appeals from the judgment of the United States District Court for the Central District of California, entered December 2, 1968, affirming a decision of the Interstate Commerce Commission, dated July 31, 1967, which denied Appellant's application to acquire a portion of the operat-

ing authority of England Transportation Company, Inc., and England Transportation Company of Texas. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW.

The opinion of the United States District Court for the Central District of California is not reported. A copy of the opinion is attached as Appendix A. The report of the Interstate Commerce Commission is reported in 104 M. C. C. 297, and a copy is attached as Appendix B (Appendix, page 6). A copy of the report and recommended order of the Hearing Examiner is attached hereto as Appendix C (Appendix, page 53).

JURISDICTION.

This suit was brought pursuant to the provisions of 28 U. S. C. 1336, 1398, 2284, 2321-2325 and 49 U. S. C. 17, 305(g) and 305(h) to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on December 2, 1968, and the Notice of Appeal was filed in that court by appellant on January 24, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal: *Burlington Truck Lines, Inc., et al.* v. *United States, et al.*, 371 U. S. 156; *American Trucking Associations, Inc.* v. *United States, et al.*, 364 U. S. 1; *Schaffer Transportation Company* v. *United States, et al.*, 355 U. S. 83; *M. & M. Transportation Co.* v. *United States, et al.*, 350 U. S. 857.

STATUTES INVOLVED.

Sections 5 and 207 of the Interstate Commerce Act (49 U. S. C. 5 and 307) and Section 10(e) of the Administrative Procedure Act (5 U. S. C. 1009(e)).

QUESTIONS PRESENTED.

1. Whether the Commission acted arbitrarily in refusing to consider the testimony of 146 witnesses and other relevant evidence in determining whether it would be in the public interest to approve acquisition by Consolidated Copperstate Lines of a portion of the operating authority of England Transportation Company, Inc., and England Transportation Company of Texas despite the fact that it determined that the rights sought to be acquired were not dormant.

2. Whether the Commission acted arbitrarily in dividing and segregating the evidence presented to it in a consolidated proceeding involving two interdependent applications, the effect of which arbitrary segregation is the failure to consider all relevant evidence in connection with either application.

3. Whether the Commission acted arbitrarily in failing to follow the guidelines set forth by it in *Consolidated Freightways Corporation of Delaware—Control—Southern Plaza Express, Inc.*, 104 M. C. C. 194 (1967) among many other cases for determining public interest despite the fact that said case was decided only six weeks prior to the decision in the instant matter and involved substantially the same issues.

STATEMENT OF THE CASE.

Appellant, Copperstate is a certificated interstate motor carrier authorized to transport general commodities between Houston, Texas and more than 1,500 points via a series of routes in the states of Arizona, California, Oregon, Texas, and Utah. On May 1, 1964, England (La.) and England (Tex.) ceased operations due to labor difficulties. On June 17, 1964, Copperstate, at a public auction, was the successful bidder for a portion of their rights between New Orleans, Louisiana, and certain points in Louisiana on the one hand, and Houston, Texas on the other. This authority would extend Copperstate's routes from Houston, its present eastern terminus, to and from New Orleans and points intermediate between Houston and New Orleans on the regular routes sought, and to and from points in Louisiana on and south of U. S. Highway 190.

Pursuant to a grant of temporary authority by the Interstate Commerce Commission on October 28, 1964, Copperstate commenced operations on the portion of the operating rights of England (La.), and England (Tex.), which it sought to acquire. Such operations continue to date as a result of a temporary restraining order, and interlocutory injunction issued by the Court below and of a Stay Order entered by Mr. Justice Harlan, on February 4, 1969.

In its application, Docket No. MC-F-8808 (the finance proceeding), Copperstate sought permanent authority from the Commission pursuant to Section 5 of the Interstate Commerce Act (49 U. S. C. 5), to consummate the transaction. Its application was heard on a consolidated record with the matter entitled *Strickland Transportation Company, Inc.,—Purchase (portion)—England Transportation Company, Inc.*, Docket No. MC-F-8798, in which Strickland sought authority to purchase the remainder of the operating authority of the England Companies. In addition,

in Docket No. MC-22167 Sub 21, Copperstate pursuant to Section 207 of the Interstate Commerce Act (49 U. S. C. 307), filed an extension application substantially similar to the authority it sought to purchase from the England Companies. This application was also heard by the same Hearing Examiner of the Commission on a consolidated record with the Strickland applications.* In a report and recommended order served May 16, 1966, the Hearing Examiner of the Commission recommended that the applications be granted. Thereafter, those carriers opposing the applications filed Exceptions to which replies were filed by both Copperstate and Strickland.

The Commission, although adopting the findings of the Examiner, reached contrary conclusions (104 M. C. C. 297, decided July 31, 1967). It denied all of the applications. Thereafter, it denied, by summary order without opinion, Appellant's petition for reconsideration (Appendix D).

As a result of the Commission action, the Appellant filed a complaint naming the Interstate Commerce Commission and the United States of America as defendants seeking review of the Commission's decision. The United States of America defended the Commission's decision through the Justice Department and the I. C. C. through the office of its general counsel. Various motor carriers who opposed granting of the application, in proceedings before the Commission, intervened as defendants and also participated in the Court proceeding for the purpose of defending the decision of the Commission.

Pending judicial review, the District Court stayed the effective date of the Commission's order terminating Copperstate's temporary authority to operate the portions of the England Companies it sought to acquire. On December 2, 1968, the Court entered a *per curiam* order affirm-

* Strickland also filed an extension application which was heard and decided on the same record. Strickland Transportation Company, Inc., MC 59680 (Sub No. 142).

ing the Commission's decision. The District Court viewed the issues raised as factual rather than legal and then held that the Commission's conclusions were supported by "substantial evidence." After receiving notice of the District Court's action, Copperstate sought an order from the District Court staying the effective date of the Commission's final order and thereby keeping its temporary authority in effect pending appeal to this Court. On January 27, 1969, the District Court denied Copperstate's motion for a Stay Order. On January 31, 1969, Copperstate filed an application for stay pending appeal addressed to Mr. Justice Douglas. By order dated February 4, 1969, Mr. Justice Harlan, to whom Copperstate's application was referred during the absence of Mr. Justice Douglas, granted Copperstate's application "pending this court's action on the jurisdictional statements conditioned, however, upon the appellants perfecting their appeals and filing their Statements on or before March 10, 1969."

QUESTIONS ARE SUBSTANTIAL.

A. Judicial Review of Agency Action.

These proceedings pursuant to Section 5 (the finance application), and Section 207 (the extension application for redescription of the routes and to fill a minor gap in the England authority from Lake Charles, Louisiana to Houston, Texas), revolve around the proposed purchase by Copperstate of a portion of the operating rights of the England Companies, and the crux of the Commission's denial of both applications lies in the Commission's erroneous consideration and disposition of the finance application.

The District Court, interpreting decisions of this Court relating to the scope of judicial review by Courts of I. C. C. decisions, so narrowly defines the area of review that it ceases to exist as a practical matter. Therefore, there is

raised by this appeal the substantial question of whether Courts will review decisions of the Interstate Commerce Commission in any meaningful way.

During the course of the hearing before an Examiner of the I. C. C., Copperstate introduced evidence of 146 witnesses in support of its Section 5 finance application and Section 207 extension application which were heard and decided on a consolidated basis. From the evidence adduced the Commission found that the rights sought to be purchased were not dormant. However, in determining whether the "public interest," as that term is used in Section 5, would be served by granting Copperstate's application, it arbitrarily refused to consider the testimony of 146 witnesses (including 141 shipper witnesses) who testified concerning their use and continued need for the services as performed under temporary authority. Thus, there is raised the substantial question concerning whether the Commission acted arbitrarily in segregating the certain evidence so as to omit reference to it in consideration of the Section 5 application (104 M. C. C. at pages 319-322, Appendix pages 38-43).

Thereafter, considering the Section 207 extension application, the Commission refers to 90 shipper witnesses, failing to consider 51 witnesses for some unstated reason, furthermore it arbitrarily segregated the shipper testimony, evidence concerning past operations and operations under temporary authority which were relevant in both proceedings and introduced in a consolidated record. The District Court, having so narrowly construed its scope of review, upholds the Commission's arbitrary segregation of testimony and its refusal to consider all evidence in both proceedings holding that these are issues of form, not substance. The issue raised is far more substantial. It is whether the Commission can arbitrarily refuse to consider the evidence offered in support of both applications and

segregate it so as to be able to find that insufficient evidence was introduced in each proceeding to support a grant of authority.

Administrative agencies and courts, including this Court, in reviewing agency decisions, have held that consistency is not essential, and that, therefore, an agency can apply its expertise so as to arrive at inconsistent decisions from time to time. However, in *Burlington Truck Lines, Inc., et al. v. United States et al.,* 371 U. S. 156 at page 167, this Court cautioned the Commission concerning the extent to which expertise may be relied upon to support a conclusion stating: "Expert discretion is the lifeblood of the administrative processes, but, 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion.' "

On June 12, 1967, the Commission decided the case of *Consolidated Freightways Corporation of Delaware—Control—Southern Plaza Express, Inc.,* 104 M. C. C. 194 (1967), which involved all of the issues raised in this proceeding, including allegations of violations of the Interstate Commerce Act. In that case the Commission set forth guidelines which it said it must follow to determine public interest in Section 5 proceedings. Yet, on July 31, 1967, only six weeks later, in its decision in this case, reported in 104 M. C. C. 297, the Commission considers public interest without even referring to or acknowledging the guidelines it had set forth only six weeks before, and without even setting forth reasons why they were not applicable in this proceeding. Accepting that the law does not require consistency in all cases, the substantial question raised in this proceeding is whether *a fortiori* inconsistency has become a virtue. Has agency reliance upon expertise to support its conclusions "become a monster which rules with no practical limits on its discretion"?

B. Argument.

1. Commission Acted Arbitrarily in Compartmentalizing and Segregating Evidence and Thereby Refusing to Consider All Relevant Evidence Introduced in Deciding Issues Raised in Section 5 and 207 Applications.

Section 5 (49 U. S. C. 5) requires the Commission in considering finance applications such as the one involved herein, to determine the public interest by weighing all of the factors surrounding a given transaction. "Public interest" is a term which has been the subject of numerous proceedings before the Interstate Commerce Commission and the Courts. This Court in *New York Federal Securities Corporation* v. *U. S.*, 287 U. S. 12 at page 25 (1932) stated:

> "The term public interest as thus used is not a concept without ascertainable criteria but has direct relationship to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred." (287 U. S. 25, 77 L. Ed. 146.)

In *Consolidated Freightways Corporation—Control—Southern Plaza Express, Inc., supra,* the Commission referring to *McLean Trucking Company* v. *U. S.*, 321 U. S. 67 (1944), among others, related its consideration of public interest to (1) prior violation of the Act stating "[I]t's only one of the elements considered . . . and does not require denial of a transaction if the evidence establishes that approval of the transaction would be in the public interest," (104 M. C. C. at page 210); (2) Participation by vendor and vendee in traffic moving between their respec-

tive territories (104 M. C. C. at page 219); (3) Financial resources of the vendee after approval of the transaction as related to its ability "to provide the shipping public in its area with a more efficient and economical service," (104 M. C. C. at page 219); (4) Result if there is a complete denial; (5) The scope and effect on competing carriers of a proposed transaction (104 M. C. C. at page 217). Having set forth those guidelines, the Commission in the *Consolidated Freightways* case concluded:

> "Considering all factors, we are convinced that Plaza's operations would terminate in bankruptcy if it were forced to continue under present management. While existing carriers no doubt could absolve some of Plaza's traffic, we are satisfied that abrupt termination of Plaza's operations would result in substantial inconvenience, if not actual hardship to the shipping public. The former employees of Plaza now employed by Consolidated would also be adversely affected by denial of the proposed transaction." (104 M. C. C. page 221.)

Six weeks later in deciding the instant case, the Commission completely ignored the *Consolidated Freightways* case, purported to consider only prior use of the vendor's authority as contrasted with the use to which Copperstate might put it and certain violations of the Act, most of which admittedly occurred prior to the time Copperstate obtained temporary authority. It did not, as it said it must do in the *Consolidated Freightways* case, consider the whole record before it to determine where the public interest lay.

Although no public witnesses testified in the *Consolidated Freightways* case, the Commission acknowledged that public interest must be related to the needs and convenience of the shipping public, and it determined that the public should not be inconvenienced or suffer hardship. In the instant proceeding, Copperstate introduced the testimony of 146 public witnesses, who testified concerning their

need for a continuation of the service being provided by Copperstate during temporary authority.* Yet, the Commission, which only six weeks before held that the interests of the shipping public must be considered even in the absence of evidence adduced by public witnesses, chose to arbitrarily segregate the evidence so as not to consider this testimony in relation to the issue of public interest. It chose to ignore the other important guidelines in the *Consolidated Freightways* case, including the improved operation of England and resulting "more efficient and economical service" to the public, and what would happen as a result of a complete denial.

The failure of the Commission to consider Consolidated's substantive evidence of public interest is arbitrary and violative of the Interstate Commerce Act and the Administrative Procedure Act. This is not an argument relating to the form of the order as stated by the District Court. We do not urge that the order should have been in a different form, nor do we urge that the Commission weighed the evidence improperly and that either the District Court or this Court should consider that evidence and arrive at some different conclusion. Much more significantly, we urge that the evidence was not weighed at all and that as a matter of law the evidence which was considered was not related to the proper criteria for determining public interest.**

In considering the Section 207 application, the Commission refers only to 90 witnesses, when in fact there were 146.*** Moreover, it fails to consider past operations and operations under temporary authority along with all of the public teestimony in determining the issues raised in

* Summarized by the Examiner (Appendix, page 119 *et seq.*).

** Commission failure to consider the evidence in relation to the proper criteria is reversible error. See for example *U. S.* v. *J. T. Transport Co.*, 368 U. S. 81, and *American Trucking Association* v. *U. S.*, 364 U. S. 1, 15-17.

*** Including 141 shippers and receivers.

the 207 application. Thus, in deciding these cases, mere reading of the Commission report demonstrates that it erroneously segregated evidence as between the two applications without regard to the fact that the evidence was introduced in a consolidated proceeding and was relevant in both proceedings. It did not, as it was bound by law to do, consider the record as a whole. Instead, it segregated the evidence in a completely arbitrary manner and then denied both the Section 5 and Section 207 applications without reference to established guidelines apparently because after segregating the evidence there was not enough in either proceeding to support a grant.

2. Commission Erroneously Relied Upon Expertise to Achieve a Result Inconsistent With Its Prior Decisions. Scope of Judicial Review of Commission's Decisions Permits Courts to Review Such Actions Because for Agencies to Adopt Different Standards for Similar Situations Is to Act Arbitrarily.

Though, consistency as to its decisions is not a virtue which the Courts impose upon the Commission, it is highly significant from the standpoint of determining the Commission's arbitrary and capricious action herein and its abuse of discretion in these proceedings to note the shocking disparity in treatment which the Commission afforded to Appellant when viewed in light of the Commission's decision in another finance proceeding decided only a few weeks before. *Consolidated Freightways Corporation, Inc., supra.*

The Court below failed to consider the question of when inconsistency becomes arbitrary. In *NLRB* v. *Mall Tool Company,* 119 F. 2nd 700 at page 702, the Seventh Circuit Court of Appeals, referring to a case where the Labor Board adopted different standards for similar situa-

tions, concluded such action was arbitrary, stating: "[U]nder such circumstances, affirmative orders violate administrative discretion and become punitive rather than remedial measures, outside the scope of the Board's powers." More recently in *Acme Cartage Company, et al. v. U. S., et al.*, 290 F. Supp. 453 (DC—Washington (1968)), a District Court reviewing inconsistent Commission application of its own rules stated: "Variable and unpredictable enforcement of important and mandatorily stated rule provisions is inequitable in principle and unsound in practice."

The inconsistency between the decision of the Commission in the instant matter and prior Commission and Court holdings is readily apparent. In deciding the Section 5 application, the Commission determines that the England rights are not dormant, then devotes the remainder of its discussion only to consideration of the lawfulness of a part of the operations conducted for the most part prior to the time Copperstate received temporary authority. Based solely upon a consideration of that issue, and an "inference" that unlawful operations may have continued, subsequently, the Commission denies the Section 5 application. None of the guidelines discussed in the *Consolidated Freightways* case is referred to and the conclusion in the instant case is exactly opposite to the one reached in the *Consolidated Freightways* case where the Commission stated: ". . . while the violation of the Act has occurred, it is only one of the elements considered in a proceeding under Section 5 and does not require denial of a transaction if the evidence establishes that approval of the transaction would be in the public interest." (104 M. C. C. at page 210.)

In the instant matter, the evidence which establishes that approval of the transaction would be in the public interest has been arbitrarily segregated out of the Section 5 proceeding. Reference by the Commission in this case to the

size of Copperstate also demonstrates the disparity of treatment—Consolidated Freightways is larger than Copperstate. The treatment afforded Consolidated Freightways, namely, in considering alleged prior violation of the Act, as only one of a series of important criteria in determining public interest is in keeping with the decision of this Court in *Gilbertsville Truck Company* v. *U. S.*, 371 U. S. 115, innumerable Commission decisions. See for example: *National Transportation Company—Purchase (Portion)—Hartford Transportation Company,* 97 M. C. C. 200, 211; *Pirkle—Purchase—P&H Refrigerated Express, Inc.,* 90 M. C. C. 36; *Midwest Emery Freight System, Inc.—Control and Merger—Interstate Truck Service, Inc.,* 101 M C. C. 19 (where the Commission took into account the testimony of 48 shippers and receivers in considering public interest), *Atlas Van Lines, Inc.—Control and Merger—*, 75 M. C. C. 175.

Reference to the possibility that the rights sought to be acquired, might be put to a "greatly differing use," as being an important issue in determining public interest is another readily apparent inconsistency with prior Commission decisions. As early as 1938, the Commission recognized and held that whenever a large carrier purchases a smaller carrier, the use to which the rights will be put always differs. Such difference does not make the transaction inconsistent with the public interest. See for example: *Trans American Freight Lines, Inc.—Purchase—Gorman,* 5 M. C. C. 712; *Overnite Transportation Company—Purchase—Rutherford Freight Lines, Inc.,* 97 M. C. C. 568, 575; *Bowman Transportation, Inc.—Control and Merger—A. W. Hawkins, Inc.,* 93 M. C. C. 133, 137; *Braswell Freight Lines, Inc.—Purchase—Shayler,* 101 M. C. C. 1, 16. The holdings in all of the above cases concerning the inevitability of a change in service resulting from every unification of rights under Section 5 was set forth again six

weeks before the decision in the instant case in the *Consolidated Freightways* case, *supra*, 104 M. C. C. at page 213.

The disregard of prior decisions resulting in a decision inconsistent with prior Commission headings, demonstrates that at least in this case inconsistency must be considered arbitrary action.

CONCLUSION.

The questions presented by this appeal are substantial and of public importance. For the reasons stated, it is urged that jurisdiction be noted and that the judgment of the District Court be reversed and that the case be remanded to that Court for disposition consistent with this Court's opinion.

Respectfully submitted,

DAVID AXELROD,
ARNOLD L. BURKE,
LEONARD R. KOFKIN,
39 South La Salle Street,
Chicago, Illinois 60603,
Counsel for Consolidated Copperstate Lines, Inc., Appellant.

PROOF OF SERVICE.

I, David Axelrod, attorney for Appellant Consolidated Copperstate Lines, and a member of the bar of this Court, do hereby certify that I have this day served its Jurisdictional Statement upon the parties to this action by mailing copies thereof to the Solicitor General, Department of Justice, Washington, D. C. 20530, as service upon the Appellee United States of America; to Robert W. Ginnane, Esquire, General Counsel, Interstate Commerce Commission, Washington, D. C. 20423, as service upon Appellate Interstate Commerce Commission; to Dennis G. Lyons, 1229 Nineteenth Street, N. W., Washington, D. C. 20036, as service upon Strickland Transportation Co., Inc., intervening Plaintiff below; to Phineas Stevens, Esquire, Butler, Snow, O'Mara, Stevens & Cannada, Suite 700, Petroleum Building, Post Office Box 22567, Jackson, Mississippi 39205; and to James Wrape, Esquire, and Robert E. Joyner, Esquire, Wrape and Hernly, 2111 Sterick Building, Memphis, Tennessee 38103, as service upon Appellee Arkansas-Best Freight System, Inc., and Gordons Transports, Inc., intervening defendants below; to Reagan Sayers, Esquire, and Clayte Binion, Esquire, Rawlings, Sayers & Scurlock, Century Life Building, P. O. Box 17007, Fort Worth, Texas 76102, attorneys for Appellee Ryder Truck Lines, Inc., intervening defendant below; to Lawrence A. Winkle, Esquire, Braswell Motor Freight Lines, Inc., P. O. Box 3989, Dallas, Texas 75208; and to M. Ward Bailey, Esquire, and T. S. Christopher, Esquire, Christopher & Bailey, 2412 Continental Life Building, Fort Worth, Texas 76102, as service upon Appellee Braswell Motor Freight Lines, Inc., intervening defendant below; to Mert Starnes, Esquire, James, Robinson, Felts & Starnes, The 904 Lavaca Building, Austin, Texas 78701, as service upon Appellees Central Freight Lines, Inc., Red Ball Motor Freight, Inc., and Saia Motor Freight

Line, Inc., intervening defendants below; to Leroy Hallman, Esquire, and William E. Livingstone III, Esquire, Phinney, Hallman, Pulley & Livingstone, 4555 First National Bank Building, Dallas, Texas 75202, as service upon Appellee Herrin Transportation Company, intervening defendant below; and to Maurice E. Hibbert, Esquire, and Warren N. Grossman, Esquire, Knapp, Gill, Hibbert & Stevens, 825 City National Bank Building, 606 South Olive Street, Los Angeles, California 90014; to W. D. Beatenbough, Esquire, Vice President-Traffic, Ryder Truck Lines, Inc., P. O. Box 2408, Jacksonville, Florida 32203; to Charles L. Ford, Esquire, Texas Railroad Association, P. O. Box 1767, Austin, Texas 78767; to Rollo E. Kidwell, Esquire, P. O. Box 10125, Dallas, Texas 75207; to Charles D. Matthews, Esquire, P. O. Box 47407, Dallas, Texas 75247; to Hugh T. Matthews, Esquire, Brooks, Montgomery & Matthews, 630 Fidelity Union Tower, 1507 Pacific Street, Dallas, Texas 75201; to Franklin H. Wilson, Esquire, McCutchen, Black, Verleger & Shea, 615 South Flower Street, Los Angeles, California 90017; and to Messrs. Russell & Schureman, 1545 Wilshire Boulevard, Los Angeles, California 90017, as additional service upon various of the aforesaid Appellees, intervening defendants below; and I do further certify that such mailing was made by air mail, postage prepaid, in the case of addressees having addresses other than in Chicago, Ill.

Dated March 6, 1969.

.....

DAVID AXELROD,
Attorney for Appellant Consolidated Copperstate Lines.

Of Counsel:

AXELROD, GOODMAN & STEINER,
39 South LaSalle Street,
Chicago, Illinois 60603.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT,

Central District of California.

CONSOLIDATED COPPERSTATE LINES, *Plaintiff,* *vs.* UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,* STRICKLAND TRANSPORTATION CO., INC., *Plaintiff in Intervention.*	CIVIL No. 68-575-F

ORDER AFFIRMING DECISION OF THE INTERSTATE COMMERCE COMMISSION.

(Entered and filed Dec. 2, 1968.)

Before BROWNING, *Circuit Judge*, and BYRNE and FERGUSON, *District Judges.*

PER CURIAM:

This is an action under 28 U. S. C. §§ 1336, 1398, 2284, 2321-2325 to annul and set aside orders of the Interstate Commerce Commission. The report and orders of the Commission, dated July 31, 1967, are published at 104 M. C. C. 297, and amended by order of March 4, 1968.

Primarily involved are the purchases of operating rights of two companies, England Transportation Company, a

Louisiana corporation, and England Transportation Company of Texas, a Texas corporation. These two companies ceased operations in 1964 due to failure to consummate a new labor agreement, and they placed their operating authority and equipment for sale at public auction. The plaintiffs, Consolidated Copperstate Lines and Strickland Transportation Co., Inc., were two successful bidders.

The statutes involved are §§ 5(2)(a)(i), 5(2)(b), 207 and 210a(b) of the Interstate Commerce Act [49 U. S. C. §§ 5(2)(a)(i), 5(2)(b), 307 and 310a(b)].

Section 5(2)(a) provides the basic permissibility for carriers to acquire control of other carriers.

Section 5(2)(b) sets forth procedures and standards for Commission approval of such transactions.

Section 207 provides for the grant of a certificate authorizing common carrier operation upon suitable findings of the public convenience and necessity.

Section 210a(b) provides for the issuance of temporary authority for one motor carrier to operate or lease the rights of another carrier.

In its § 5 purchase application, Copperstate sought to obtain through the purchase of a portion of the rights of England Transportation Company of Louisiana (England, La.), and England Transportation Company of Texas (England, Tex.), more direct routes from its western and southwestern service territory to points in Texas and to penetrate the New Orleans, Louisiana, service territory by providing service between New Orleans and Houston, Texas. Copperstate also filed an application for authority under § 207 for an extension of the rights it sought to acquire.

By its § 5 purchase application, Strickland sought to obtain through the purchase of England (La.) a competitive, direct north-south route between its present east and northern service territory, on the one hand, and, on the

other, New Orleans—from Texarkana, Texas, through Shreveport, Louisiana. Also, in a § 207 application, Strickland sought to convert a portion of the England (La.) rights from irregular-route authority to regular-route authority.

Temporary authority to operate the rights of the England Companies was granted by the Commission in September 1964 and both Strickland and Copperstate commenced operation the following month.

Both Copperstate and Strickland sought approval before the Commission and were given temporary authority to operate under the England rights pending final order of the Commission. The hearing examiner recommended, generally, approval of the applications, but the Commission, with four dissenters, denied the applications. In reversing the examiner's recommendation, the Commission, upon substantial evidence, found (1) that both Copperstate and Strickland were relying on past operations unlawfully performed by the England Companies in violation of the terms of their certificates, (2) that to the extent such past operations had been unlawfully performed, they would not be considered as probative of the public interest, (3) that both Copperstate and Strickland, as well as the England Companies, had performed so-called cross-hauling in violation of their certificates, (4) that Strickland had unlawfully managed and controlled certain rights of England (La.) prior to the Commission's approval of the temporary lease arrangement, (5) that both purchase proposals were so different from that service lawfully rendered as to constitute a new service for which the public convenience and necessity must be proved, (6) that neither carrier had borne its burden of proof in showing a need for the new services, and (7) that neither Strickland nor Copperstate was entitled to any special consideration under the doctrine of color-of-right or because of an overriding public interest.

Before the Commission's orders became effective, this action was filed. A temporary injunction and interlocutory judgment have stayed the effective date of the Commission's orders. We now conclude that the Commission's orders should be upheld.

In a § 5 application proceeding, the burden is upon the applicant to show that a new service will not be created. The applicant must show both (1) that the prior operations were not dormant, and (2) that the use to which the purchased rights would be put would not radically differ from their prior use. *Braswell Motor Freight Lines, Inc.* v. *United States,* 275 F. Supp. 98 (W. D. Tex. 1967), *aff'd per curiam,* 389 U. S. 569, *rehearing denied,* 390 U. S. 975 (1968).

If the Commission finds under a § 5 proceeding that the rights to be purchased were dormant or a new competitive service created, or that the vendor was selling more rights than he had, then the applicant must present proof under a separate § 207 application that the public convenience and necessity require the granting of the application.

The test of court review of the Commission's actions is the same in a § 5 as in a § 207 proceeding. In a § 207 proceeding, the test is "It [the reviewing court] cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law". *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U. S. 515, 536 (1946). In a § 5 proceeding " 'the wisdom and experience of the Commission', not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest'. . . . If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it

is not our function to upset its order". *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 87-88 (1944).

The plaintiffs' attack against the Commission's decision is bolstered by the fact that the hearing examiner and four of the commissioners would grant the applications. This circumstance, however, does not permit this court to vary from the established rules of judicial review.

The Commission considered all four applications in one report and order. As a result, the report, being one document, did not separate item by item the findings in regard to each application. This method of drafting its report certainly cannot be fatal to the Commission's orders. Form does not govern substance, and the Commission's findings in the § 207 proceedings are fully applicable to the same issues in the § 5 matters. A study of the Commission's report requires the conclusion that its discussion rationally segregates and disposes of all issues raised in each proceeding.

The record of the proceedings establishes that the Commission's orders were based on substantial evidence and according to the applicable law. Plaintiffs in effect are asking this court to direct the Commission to be more lenient in its disposition, a position advanced by the four dissenting commissioners. The case does not permit the court to be so motivated even if it were so disposed.

IT IS ORDERED that the decision of the Commission be, and the same is, affirmed.

Dated this 29th day of November, 1968.

JAMES R. BROWNING,
United States Circuit Judge,

WILLIAM M. BYRNE,
United States District Judge,

WARREN J. FERGUSON,
United States District Judge.

APPENDIX B.

Served August 15, 1967

INTERSTATE COMMERCE COMMISSION.

No. MC-F-8798[1]

STRICKLAND TRANSPORTATION CO., INC.—PURCHASE (PORTION)—ENGLAND TRANSPORTATION CO., INC.

Decided July 31, 1967.

1. In No. MC-F-8798, purchase by Strickland Transportation Co., Inc., of certain of the operating rights of England Transportation Co., Inc., and acquisition by L. R. Strickland of control of the operating rights through the purchase, denied.
2. In No. MC-59680 (Sub-No. 142) public convenience and necessity found not shown to require operation by Strickland Transportation Co., Inc., as a motor common carrier, over a regular route, between Shreveport and New Orleans, La. Application denied.
3. In No. MC-F-8808, purchase by Consolidated Copperstate Lines of certain of the operating rights and property of England Transportation Co., Inc. and the operating rights of England Transportation Company.

1. This report also embraces Nos. MC-59680 (Sub-No. 142), Strickland Transportation Co., Inc., Extension—New Orleans; MC-F-8808, Consolidated Copperstate Lines—Purchase (Portion) —England Transportation Co., Inc., and England Transportation Company of Texas; and MC-22167 (Sub-No. 21), Consolidated Copperstate Lines, Extension—New Orleans.

of Texas, and acquisition by Horace W. Steele, Service Tank Lines, Cornel G. Allen, and Walter B. Allen of control of the operating rights and property through the purchase, denied.

4. In No. MC-22167 (Sub-No. 21) public convenience and necessity found not shown to require operation by Consolidated Copperstate Lines, as a motor common carrier, over a regular route, between Houston, Tex. and New Orleans La. Application denied.

David Axelrod, W. T. Brunson, R. Douglas Coffin, and *Leonard R. Kofkin* for applicants.

M. Ward Bailey, Louis I. Dailey, Bob W. Fleming, Charles R. Ford, Jr., William F. Goodwin, Leroy Hallman, Rollo E. Kidwell, Charles D. Matthews, Hugh T. Matthews, Oscar P. Peck, Reagan Sayers, R. Y. Schureman, Mert Starnes, and *Phineas Stevens* for protestants.

A. R. Allen for intervenor.

REPORT OF THE COMMISSION.

TUGGLE, *Commissioner:*

Exceptions were filed by certain protestants to the report and recommended order of the hearing examiner to which all applicants replied. Our conclusions differ from those of the examiner.

By joint application in No. MC-F-8798, filed July 1, 1964, Strickland Transportation Co., Inc., hereinafter called Strickland, of Dallas, Tex., and England Transportation Company, a Louisiana corporation, hereinafter called England (La.) of New Orleans, La., seek authority under section 5 of the Interstate Commerce Act for the purchase by the former of certain of the operating rights of the latter for $495,000. By the same application, L. R. Strickland,

also of Dallas, who controls Strickland through ownership of a majority of its capital stock, seeks authority under the same section to acquire control of the said operating rights through the purchase.

By another application in No. MC-59680 (Sub-No. 142), filed December 7, 1964, as a matter directly related to the application in No. MC-F-8798, Strickland seeks authority under section 207 of the act to convert a portion of the operating rights sought to be acquired from irregular-route to regular-route operations, as hereinafter further explained.

By a second joint application, in No. MC-F-8808, filed July 7, 1964, Consolidated Copperstate Lines, a California corporation, hereinafter called Copperstate, of Montebello, Calif., England (La.), and England Transportation Company of Texas, a Texas corporation, hereinafter called England (Tex.), of Houston Tex., seek authority under section 5 of the act for the purchase by Copperstate of certain of the operating rights and property of England (La.) and all of the operating rights of England (Tex.) for a total of $400,000. By the same application, Horace W. Steele, Service Tank Lines, Cornel G. Allen, and Walter B. Allen, all of Montebello, seek authority under the same section to acquire control of the operating rights through the purchase.

In another application in No. MC-22167 (Sub-No. 21), filed December 21, 1964, Copperstate seeks authority under section 207 of the act to operate, as a motor common carrier over regular routes, in the same area as a portion of the irregular-route operating rights to be acquired, as hereinafter further explained. Although the notice of the filing of this application in the Federal Register stated that it was directly related to the finance proceeding in No. MC-F-8808, this is only partially true, since a portion of the authority sought by Copperstate in its extension proceeding

is new authority, and thus cannot be directly related. By order of November 18, 1966, under section 17 of the act, the entire matter in No. MC-22167 (Sub-No. 21) was assigned to division 3 for handling and determination on a consolidated record with the proceedings in Nos. MC-F-8987, MC-F-8808, and MC-59680 (Sub-No. 142). However, thereafter we recalled all of the proceedings from division 3. The publication also stated that the application was one to be determined under the special conversion rules as set forth in No. MC-C-4366, but this was later retracted. It is conceded by applicants that the application is one to be decided on the basis of public convenience and necessity.

Hearing has been held at which 14 motor carriers[2] and the Texas Railroad Association, representing the 11 railroads operating in Texas and the motor carrier subsidiaries of 2 of them, appeared, cross-examined applicants' witnesses, and certain of them introduced evidence. In addition, the Portland (Oreg.) Traffic Association intervened in support of the Copperstate applications. The findings of the hearing examiner with respect to the financial condition of applicants and, the history, organization, and operations of applicants and protestants are adopted as our own except to the extent they may be inconsistent with our

2. *Group 1:* Braswell Motor Freight Lines, Inc. (Braswell), Gordon's Transports, Inc. (Gordons), East Texas Motor Freight Lines, Inc. (East Texas), Herrin Transportation Co. (Herrin), Red Ball Motor Freight, Inc. (Red Ball), and Saia Motor Freight Line, Inc. (Saia); *Group 2:* Campbell Sixty-Six Express, Inc. (Campbell), Arkansas-Best Freight System, Inc. (Arkansas-Best), and Delta Motor Line, Inc. (merged into Arkansas-Best on July 6, 1965 and hereinafter considered a part of that carrier); and *Group 3:* Brown Express, Inc. (Brown), Central Freight Lines, Inc. (Central), Western Gillette, Inc. (Western Gillette), Ryder Truck Lines, Inc. (Ryder), and Red Arrow Freight Lines, Inc. (Red Arrow). Carriers in group 1 are protestants to all four of the applications herein; those in group 2 are protestants only to Strickland applications; and those in group 3 are protestants only to the Copperstate applications. For convenience, protestants will hereinafter be referred to by the short names shown in parenthesis.

findings. Applicants in each of the two purchase proceedings are motor common carriers in interstate or foreign commerce, and in each case they operate in excess of 20 motor vehicles in transportation subject to part II of the act.

TEMPORARY AUTHORITY.

Pursuant to orders entered September 30, 1964, in each of the two purchase proceedings, as amended by order of February 5, 1965 in No. MC-F-8798 and by orders of February 15, 1965 in Nos. MC-F-8798 and MC-F-8808, Strickland and Copperstate were authorized to lease the respective portions of the operating rights of England (La.) which they seek to acquire under those applications. Copperstate was also authorized to lease the motor carrier equipment of England (La.) and certain of the operating rights of England (Tex.). All lease rentals so paid would apply as partial payment of the purchase price in the event of approval. Temporary operations under these authorities were instituted by Strickland on October 5, 1964, and by Copperstate on October 28, 1964.

HISTORY AND OPERATIONS OF THE ENGLAND COMPANIES.

England (La.).—This company was incorporated in 1942. In 1954 control passed into the hands of J. C. Hunter. In 1958 Strickland contracted with Hunter to purchase all of the stock of England (La.) for $175,000, which transaction was the subject of an application denied by this Commission in *Strickland Transp. Co., Inc.—Control—England Transp. Co.*, 85 M. C. C. 549, hereinafter called the prior *Strickland-England* case, based chiefly upon the fact that approval would create a new competitive service to the detriment of protestants therein and for which no need had been shown. Shortly thereafter, in July 1961, control of England (La.) passed to C. L. Callaway, a noncarrier indi-

vidual and its present principal stockholder through a transfer of stock, a transaction which, standing by itself, was not subject to this Commission's jurisdiction. However, at about the same time Callaway also acquired control of England (Tex.), a situation discussed further hereinafter.

Under certificates issued in Nos. MC-57946 (Sub-Nos. 2 and 3) on May 18, 1950, and September 22, 1950, respectively, England (La.) was authorized to perform the following operations in interstate or foreign commerce.

No. MC-57946 (Sub-No. 2):

General commodities, except dangerous explosives, household goods, as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M. C. C. 467, commodities in bulk, and those requiring special equipment, over irregular routes, from New Orleans and Plaquemine, La., to Baton Rouge and Thibodaux, La.; from New Orleans and Plaquemine, La., to Ponchatoula, Hammond, Kentwood, Amite and Clinton, La.; Between New Orleans, La., and Plaquemine, La.

No. MC-57946 (Sub-No. 3):

General commodities, except household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M. C. C. 467, dangerous explosives, commodities in bulk, and commodities requiring special equipment, over irregular routes, between New Orleans, La., and points within 10 miles of the corporate limits of New Orleans, on the one hand, and on the other, points in Louisiana, except from New Orleans to Amite, Baton Rouge, Clinton, Hammond, Kentwood, Ponchatoula and Thibodaux, La., and between New Orleans and Plaquemine, La.; and composition pipe, and connections and fittings therefor, over irregular routes, from Marrero, La., to points in Mississippi on and south of U. S. Highway 80.

Its authority to transport composition pipe from Marrero, La. to certain points in Mississippi was also sold to another party at the time of the purchase agreements herein. That

transaction was approved in No. MC-F-8842, *Deaton Truck Lines, Inc.—Purchase—England Transp. Co., Inc.,* (not printed) decided June 4, 1965. Its authority to operate as an intrastate carrier in Louisiana was similarly sold.

England (Tex.).—Originally known as D. A. Beard Truck Lines, control of this carrier was acquired by Callaway in July 1961, and it was operated under that name until mid-1963 when its name was changed to England Transportation Company of Texas. On April 15, 1963, this Commission instituted an investigation under section 5(7) of the act in No. MC-F-8415, *Clarence L. Callaway—Investigation of Control—D. A. Beard Truck Lines Company and England Transportation Co.* to determine whether common control of the two carriers had been acquired unlawfully. Shortly thereafter, Callaway filed an application in No. MC-F-8563 seeking approval of the common control should it be found to be required. The two cases were heard on a consolidated record. The examiner found that common control had been effected in violation of section 5 of the act, but that the circumstances were mitigating. He recommended approval of the application in No. MC-F-8563 and discontinuance of the investigation in No. MC-F-8415, which recommendation was adopted by decision and order of the Commission on December 23, 1964.

England (Tex.) is authorized to operate in interstate or foreign commerce as a motor common carrier, over irregular routes, as follows:

No. MC-2960 (Sub-No. 1):

General commodities, except those of usual value, classes A and B explosives, livestock, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, from Houston, Tex., to Lake Charles and Shreveport, La., and those points in Texas on and east of the line beginning at the Red River and extending along U. S. Highway 277 through

Wichita Falls to Abilene, Tex., thence along U. S. Highway 83 (formerly portion U. S. Highway 277) at or near Ballinger, Tex., thence along U. S. Highway 67 to San Angelo, Tex., thence along U. S. Highway 87 to San Antonio, Tex., and thence along U. S. Highway 81 to Laredo, Tex., and cotton, cotton linters, wool, and mohair, from the above-described destination points to Houston, Tex.

Combined operations.—Prior to temporary authority, the combined operations of the two England companies were almost wholly between Houston and New Orleans, with interchange at Lake Charles, La., and moved in substituted trailer-on-flatcar service (TOFC) of the Southern Pacific Company. The operation was complicated by the fact that while England (La.) holds authority *between* New Orleans and points in Louisiana, and thus could operate in either direction, the rights of England (Tex.) are limited to eastbound movement *from* Houston *to* Lake Charles. Thus, while the trailers were loaded on flatcars at either Houston or New Orleans and proceeded through to the other city with interruption, the movement can be considered to have been constructively interchange between the England companies at Lake Charles on eastbound movements but needed another basis for the westbound movements. This, the carriers allege, was provided by interchange of the shipments at Lake Charles between England (La.) and the Southern Pacific pursuant to the same agreement under which TOFC was provided. It does not appear that Southern Pacific participated in any individual shipment as a participating carrier or that any division of revenue occurred between the England companies and Southern Pacific other than the flat rate charge for TOFC service. Moreover, the agreement between the England companies and Southern Pacific for TOFC and the tariff published pursuant thereto expressly disclaims any responsibility in Southern Pacific other than as a TOFC carrier.

Cessation of operation—On April 30, 1964, the England companies ceased all operations, citing unsuccessful negotiations on a new labor agreement for work to be performed after May 1 of that year. They state that the union representing its drivers had indicated that national wage levels would be required by the new contract and that the increase expenses resulting from this wage increase would have totaled $185,000, which could not have been absorbed in its operations without substantial authority losses. Accordingly, they placed their operating authority and equipment for sale at public auction, which was conducted on June 17, 1964. The two vendees herein and Deaton Truck Lines, Inc., were the successful bidders for the interstate operaing rights and the equipment.

BACKGROUND AND OPERATIONS OF STRICKLAND.

Strickland, a Texas corporation, has 10 shares outstanding, of which 9 are owned by L. R. Strickland and 1 by F. B. Strickland. It is a long-line carrier, principally of general commodities, over a network of regular routes, extending between New Orleans, La., and Texas points, on the south, and Boston, Mass., on the north, serving such points as Houston, Dallas, and Texarkana, Tex., Little Rock, Ark., Memphis, Tenn., St. Louis, Mo., Chicago, Ill., Cleveland, Ohio, and New York, N. Y., plus numerous intermediate and off-route points. It has extensive terminal facilities at principal points. Although it is presently authorized to serve New Orleans, it must do so by a circuitous route from Texarkana via Houston and Beaumont, a distance of 644 miles as opposed to the more direct route from Texarkana via Shreveport, La., of 389 miles. It was alleged that Strickland may operate to New Orleans over a deviation route via Kinder, La., stated in the record to be somewhat shorter than via Houston. However, this is misleading because that deviation route applies to Dallas-Kinder-New

Orleans movements. Therefore, on shipments to and from points north of Texarkana, if that deviation route were to be lawfully utilized by tacking at Dallas, it would be approximately 750 miles from Texarkana to New Orleans.

Strickland is also authorized to operate between Little Rock, Ark., Greenville, Miss., and Monroe, La., by virtue of newly-regained rights which had been under long-term lease to another carrier, and which had not been regained at the time of the hearing. However, the prospect and the ultimate effect of their being regained was considered in some detail both at the hearing and by the hearing examiner in his report and recommended order. The rights in question were leased to Burks Motor Freight Line in 1948 for 10 years with an option to renew for another 10 years at expiration. This arrangement was approved by the Commission in No. MC-FC-31502 on March 18, 1948. The option was exercised in 1958 for an additional 10 years, and, as extended, approved by the Commission in *Burks M. Freight Line, Inc.—Lease—Strickland Transp. Co.*, 75 M. C. C. 153 (1958). This lease would have nominally expired on March 18, 1968.

On August 30, 1966, the United States District Court for the Eastern District of Arkansas, Western Division, issued its judgment in *Strickland Transp. Co., Inc.* v. *Burks M. Freight Line, Inc.* which terminated the lease and returned the operating rights to Strickland. Although the judgment of the district court has been appealed by Burks, it was not stayed, and accordingly, it has become effective. Strickland has notified the Commission that it has instituted operations under those rights. Since the temporary operations by Strickland of the operating rights of England (La.) would permit operations between either Shreveport or Monroe and New Orleans, and the route by Monroe is considerably shorter from Little Rock to New Orleans than over the Texarkana and Shreveport gateways, presumably Strickland's long-line service between New Orleans and

northern points is now being conducted over Monroe, as Strickland's witness testified at the hearing that it would do. Thus, the Monroe route takes on more important than existed at the time of the hearing when this shortcut was more remote.

As mentioned, Strickland earlier attempted to secure more direct access to New Orleans by acquisition of the stock of England, but this was denied. In August 1960, Strickland made another effort to offset its circuity to New Orleans by use of TOFC service of the Illinois Central Railroad from and to East St. Louis, Ill. This was discontinued thereafter as a result of a complaint by Gordons, a protestant herein, in *Gordons Transport, Inc.* v. *Strickland Transp. Co.*, 318 I. C. C. 395 (1962), hereinafter referred to as the *Gordons-Strickland complaint* case, where the Commission forbade such an arrangement on grounds that it provided an undue competitive advantage, allowing service different from that provided by Strickland's certificate. The Commission's decision was upheld in *Strickland Transp. Co.* v. *United States,* 219 F. Supp. 618 (1963). This decision was cited as a factor in the reasoning a short time later in Ex Parte 230, *Substituted Service—Piggyback,* hereinafter referred to as the *Piggyback Rules* case, 322 I. C. C. 301, 323, the decision which considered the promulgated the rules for so-called TOFC or "Piggyback" service, and which, among others, put forth the rules that a motor carrier must have over-the-road authority to serve any two points served in TOFC service, and that the distance by rail be not less than 85 percent of the authorized over-the-road distance.[3]

3. The effective date of the rules has been stayed by the Commission on its own motion pending appeal to the courts. In *Atchison, T., & S. F. Ry. Co.* v. *United States,* 244 F. Supp. 995, two of the rules were found by the district court to be beyond the Commission's authority to impose. However, the "85-percent" rule respecting circuity was expressly upheld. The lower court was affirmed by the Supreme Court on May 29, 1967 (G. C. Memo. 130-67).

The next and most recent attempt to reach New Orleans more directly began in 1961 in an arrangement by which Strickland delivered loaded and sealed trailers to England (La.) at Shreveport for transport to New Orleans and at New Orleans for the return movement. In each case the traffic and trailer was originated by Strickland and turned back to it at destination for which Strickland paid England (La.) a flat fee, irrespective of the weight or contents of the trailer. England (La.) furnished only the motive power for such movements. This arrangement ceased in May 1964 when the England companies discontinued operations, but Strickland began using the Shreveport-New Orleans route again in October 1964 when it began temporary operation of this portion of the authority of England (La.).

THE STRICKLAND APPLICATIONS.

No. MC-F-8798.—The two purchase applications herein contemplate a split of the destination-territory contained in the radial and other operating rights of England (La.) in No. MC-57946 (Sub-Nos. 2 and 3) along U. S. Highways 190, 165, and 90 in Louisiana. Strickland would purchase, for $495,000, that portion which authorizes transportation of general commodities, with exceptions (1) from New Orleans and Plaquemine, to Kentwood, Amite, and Clinton, La., and (2) between New Orleans and points within 10 miles of the corporate limits thereof, on the one hand, and on the other, points in Louisiana north of a line beginning at the Mississippi-Louisiana State line and extending along U. S. Highway 190 to its intersection with U. S. Highway 165 at Kinder, La., thence along U. S. Highway 165 to its intersection with U. S. Highway 90 near Iowa, La., and thence along U. S. Highway 90 to the Texas-Louisana State line except from New Orleans to Kent-

wood, Amite, and Clinton, La.[4] of the purchase price, $49,500 was placed into escrow at execution of this agreement, which at consummation would be released to England (La.), and Strickland would at that time pay an additional amount to bring its total payment at consummation to 29 percent of the total adjusted consideration, i.e., the total consideration less any amounts that may have been paid as lease rental under temporary authority at the rate of $7,425 per month. The balance would be represented by five equal promissory notes, one of which would be payable on or before each of the five succeeding anniversaries of the consummation date and bearing interest at the rate of 6 percent per annum on the unpaid balance. Strickland would pay the purchase price from current funds and no borrowing would be required.

No. MC-59680 (Sub-No. 142).—Strickland seeks authority under this application to operate, over regular routes, in the transportation of:

> General commodities, except household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, dangerous explosives, commodities in bulk, and commodities requiring special equipment, between New Orleans and Shreveport, La., from New Orleans, via U. S. Highway 61 to its intersection with U. S. Highway 190, thence via U. S. Highway 190 to its intersection with U. S. Highway 71, thence via U. S. Highway 71 to Shreveport, and return over the same route, serving all points within 10 miles of New Orleans as off-route points, and restricted

4. As designated by applicants, the description is slightly deficient in that U. S. Highway 190 does not quite reach the Mississippi-Louisiana State line. The description will be amended to what was obviously intended, i.e., "points in Louisiana north of a line beginning at the Mississippi-Louisiana State line and extending along U. S. Highway 90 to its junction with U. S. Highway 190, thence along U. S. Highway 190," and will be hereinafter considered in this manner. The temporary authorities in these cases were also so amended by us.

against traffic originating at, or destined to points more than 10 miles from New Orleans corporate limits and on U. S. Highway 61 on or south of its intersection with U. S. Highway 190.

This application is conditioned upon approval of the application in No. MC-F-8798 to purchase a portion of the operating rights of England (La.) and is actually an attempt to change an existing irregular-route authority to regular route in frank acknowledgement that this portion of the England (La.) authority has in the past been operated as a regular route. The application does not, however, seek to alter, cancel, or otherwise relinquish any of the remaining irregular routes of England (La.) sought in the purchase transaction.

BACKGROUND AND OPERATIONS OF COPPERSTATE.

Copperstate, together with its wholly owned subsidiaries, Valley Motor Lines, Inc., and Valley Express Co., form a large intergrated system which is a portion of an even larger interlocking corporate complex. The history, operations, and corporate affiliations of Copperstate have been described in detail and approved in several recent decisions of the Commission.[5] As a system, Copperstate is authorized to operate, largely in this transportation of general commodities, over regular routes, between Portland, Ore., and Los Angeles, Calif., between Los Angeles and several Texas points, and between Phoenix, Ariz., and Salt Lake City, Utah, serving virtually all principal intermediate points. It and its affiliates have extensive authority within this general area as to both general and specified commodities and as to specialized service to serve a wide

5. *Consolidated Copperstate Lines—Pur.—Sunset M. Lines*, 85 M. C. C. 113; *Valley Motor Lines, Inc.—Pur.—Pierce Freight Lines, Inc.*, 87 M. C. C. 317, reversed on new evidence on April 16, 1962 (not printed); and *Consolidated Copperstate Lines—Purchase —Nielsen*, 90 M. C. C. 483.

range of intermediate or off-route points, over regular and irregular routes.

As here pertinent, Copperstate itself operates from and to the Pacific coast through Arizona and New Mexico, and enters Texas via the El Paso gateway. From El Paso its routes radiate northward and eastward to Amarillo, Dallas-Fort Worth, and Houston, forming a network in southwest Texas, but providing no direct route between those three terminal points. Between Amarillo and Dallas it must operate circuitously via Sweetwater, and between Dallas and Houston via Brownwood and Austin.

THE COPPERSTATE APPLICATIONS.

No. MC-F-8808.—Copperstate would purchase (1) all of the operating rights of England (Tex.); (2) those portions of the operating rights of England (La.) which authorize the transportation of general commodities, over irregular routes, (a) from New Orleans and Plaquemine, to Baton Rouge, Thibodaux, Ponchatula, and Hammond, La., (b) between New Orleans and Plaquemine; and (c) between New Orleans and points within 10 miles of corporate limits thereof, on the one hand, and on the other, points in Louisiana on and south of a line beginning at the Mississippi-Louisiana State line and extending along U. S. Highway 90 to its intersection with U. S. Highway 190, thence along U. S. Highway 190 to its intersection with U. S. Highway 165 at Kinder, La., thence along U. S. Highway 165 to its intersection with U. S. Highway 90 near Iowa, La., and thence along U. S. Highway 90 to the Texas-Louisiana State line, except from New Orleans to Baton Rouge, Thibodaux, Ponchatula, and Hammond, La.; and (3) the motor vehicle equipment of England (La.) as enumerated in the written agreement between the parties, for a total consideration of $400,000. Of the purchase price, $40,000 was placed in escrow at execution of the agreement, to be re-

leased to the England companies at consummation. The remainder would be paid $110,000 additional, in cash, at consummation, and the balance of the total adjusted consideration, i.e., the total consideration less any applicable amounts paid as lease rental under temporary authority, would be represented by five promissory notes, one of which would be payable on or before each of the five succeeding anniversaries of the consummation date, and bearing interest at the rate of 6 percent on the unpaid balance.

The purchase price is allocable $225,000 to the motor vehicle equipment and $175,000 to the operating rights. An independent appraisal shows the equipment to be valued at $209,950. All sums paid under temporary authority shall be applied as partial payment of the purchase price. In the case of the operating rights, the monthly rental is $2,500, and for the equipment, a monthly rental not exceeding $5,834.29 that being the amount due monthly on the equipment lien payments as of the date of the agreement, the amounts thereafter decreasing as the interest decreases. When Copperstate has paid a total of $105,000 as lease rental on the equipment, then the monthly rental thereon will drop to $1 until the application under section 5 is determined. The equipment would be sold to and retained by Copperstate at the $105,000 figure if the section 5 application is not approved. As the monthly lease rental for the equipment would pay the $105,000 purchase price in approximately 18 to 20 months, and over 2 years have elapsed since the advent of temporary authority, it is safe to assume that the equipment price has now been fully paid.

No. MC-22167 (Sub-No. 42).—Copperstate seeks authority under this application to operate as a motor common carrier, over regular routes, in the transportation of:

> General commodities, except dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M. C. C. 467,

commodities in bulk and commodities requiring special equipment; between Houston, Tex., and New Orleans, La., serving all intermediate points, from New Orleans, La., via Interstate Highway 10 and U. S. Highway 61 to Baton Rouge, La., thence via U. S. Highway 190 to Kinder, La., thence via U. S. Highway 165 to its intersection with Interstate Highway 10 and U. S. Highway 90 near Iowa, La., thence via U. S. Highway 90 to Lake Charles, La., and to the Louisiana-Texas State line, thence via U. S. Highway 90 and Interstate Highway 10 to Houston, Tex., and return over the same route. From Houston, Tex., over U. S. Highway 90 (via Beaumont, Tex.) to its intersection with Interstate Highway 10, thence via Interstate Highway 10 and U. S. Highway 90 to Lake Charles, La., thence via Interstate Highway 10 and U. S. Highway 90 to New Orleans, La., and return over the same route.

As previously pointed out, the regular-route authority sought herein is largely encompassed by the irregular-route authority sought to be purchased in No. MC-F-8808, except that England (Tex.) holds no authority westbound from Lake Charles, La., to Houston, Tex., and to this extent the application is one for new authority.

THE EXAMINER'S RECOMMENDATIONS.

The examiner found that the operations of the England companies, to the extent that he would recommend granting the applications, were lawful and continuous except insofar as England (La.) had been cross-hauling its radial base-point of New Orleans, and that this unlawful activity had resulted from a misunderstanding of a reply to an earlier inquiry by England (La.) of the local I. C. C. supervisor regarding permissible use of its authority. To illustrate the unlawful movements, consider a shipment picked up at Shreveport, moved to New Orleans, and then delivered in Lake Charles. See *Gay's Exp., Inc.* v. *Haigis and Nichols,*

43 M. C. C. 277, and cases cited therein. He found that protestants would either be protected by the conditions he would impose or would not be materially affected by approval of the applications. On this basis, he recommended approval of the applications in Nos. MC-F-8798 and MC-F-8808 to the extent that the rights were shown to have been operated by the England companies. But on the basis of this showing and the accompanying section 207 applications in each case, he recommended conversion of portions of the acquired rights from irregular route to regular route, subject to certain restrictions which he thought appropriate, and cancellation of the remainder because of dormancy.

The Strickland applications.—The examiner recommended approval of the application in No. MC-59680 (Sub-No. 142) by which Strickland would be granted authority to transport general commodities, with exceptions, over a regular route, between Shreveport and New Orleans. He also found that the application to purchase in No. MC-F-8798 should be granted as to that portion of the operating rights of England (La.) between New Orleans and Monroe, serving a number of intermediate and off-route points, and that that authority should be then redescribed as a regular route, citing the Commission's action in *Deaton Truck Lines, Inc.—Purchase—Lavender,* 97 M. C. C. 256 (decided August 7, 1964), hereinafter referred to as the *Deaton-Lavender* case, upheld in *Alabama Highway Express* v. *United States,* 241 F. Supp. 290, and affirmed, *per curium,* by the Supreme Court at 382 U. S. 106. In each case he would restrict the authority to be acquired or granted against combining with any other operating rights held by Strickland to provide a single-line service between New Orleans and the Memphis, Tenn., commercial zone, and he would similarly restrict the Monroe-New Orleans route against combining to provide a service between points on that route and those in the Shreveport commercial zone.

The Copperstate applications.—The examiner recommended approval of the application in No. MC-F-8808 subject to certain conditions and restrictions. He would authorize acquisition of the general commodity, irregular-route rights of England (La.) in No. MC-57946 (Sub-Nos. 2 and 3) from New Orleans and Plaquemine to Thibodaux, Ponchatoula, and Hammond, between New Orleans and Plaquemine, and between New Orleans and points within 10 miles thereof, on the one hand, and on the other, the described area of Louisiana south of U. S. Highways 90, 190, 165 and 90. He would also grant the application as to Houston-New Orleans service, and pursuant to a grant of the accompanying section 207 application in No. MC-22167 (Sub-No. 21), would define the emerging irregular-route authority of England (La.) and England (Tex.) to provide for a regular route between Houston and New Orleans, serving the intermediate points of Baton Rouge and Lake Charles, the off-route point of New Iberia, La., and points within 10 miles of New Orleans, unrestricted, and Beaumont, Tex. on eastbound traffic only. This route would be only over Interstate Highway 10 rather than the several routes requested by applicants. The entire authority which he would grant would be subject to restrictions (1) that the regular- and irregular-route rights could not be combined to provide a through service between points on the regular routes and points on the irregular routes other than Plaquemine, Thibodaux, Ponchatoula, and Hammond, and (2) that the authorities be restricted against traffic moving from, to, or through points in Louisiana north of U. S. Highways 90, 190, 165 and 90.

EXCEPTIONS OF PROTESTANTS.

Exceptions were filed by Arkansas-Best and jointly by Gordons and Campbell Sixty-Six to the report of the examiner as it pertains to the Strickland applications. Similarly, Ryder, Central, and Saia filed exceptions to the report only as it applies to the Copperstate applications. Exceptions as to all applications were filed by Red Ball, Herrin, and Braswell. As the points raised on exceptions are substantially similar, they will be stated collectively as to each vendee-applicant unless specific reference to a certain protestant is deemed necessary.

The Strickland applications:—Protestants urge that the operations of England (La.) were dormant, both constructively and in fact. They point out that the England companies simply abandoned their operations in May, 1964 on the basis of being unwilling, not unable, to conduct operations because of the mere possibility, not certainty, of a future labor dispute and its effect, and that no operations were conducted under their operating rights until October, 1964 when temporary authority was granted. They further charge that the unlawful aspect of certain of the operations render them inadmissible as evidence of an active and continuous service. They state that the purchase price is unreasonable, particularly in view of the prior *Strickland-England* case in which a much smaller amount was found excessive, and that a strong suspicion exists that vendor's stockholder is trafficking in operating rights.

Protestants strongly urge that the Shreveport-New Orleans operation of Strickland and England (La.) was unlawful since they conducted regular-route operations over irregular-route authority, both before and during temporary authority, in violation of the principles enunciated in *Transportation Activities, Brady Transfer & Storage Co.*, 47 M. C. C. 23, hereinafter called the *Brady* case. Also

they call unlawful the so-called "interchange" at Shreveport and New Orleans which they characterize variously as (1) control of the operations of England (La.) by Strickland, or (2) a pooling of traffic and services in violation of section 5(1) of the act. They also charge that the examiner wrongfully held this proceeding as not a proper place to adjudicate these questions of unlawfulness and in styling the Strickland-England arrangement as merely "novel," pointing out that it was essentially the same arrangement that was stopped in the *Gordons-Strickland complaint* case, and that he accordingly erred in finding that the arrangement did not impinge on the fitness of Strickland nor cast the "curse of dormancy" upon England's authority between Shreveport and New Orleans because those operations "were not challenged by the Commission or other carriers for 2½ years" and thus may not now be considered.

Additional assignments of error which protestants attribute to the examiner's report are that he erred in finding that the illegal crosshauls of a radial base point by England (La.), which he did find to have occurred, were the result only of a misinterpretation of a supervisor's letter by the president of that company; that he erred in stating that other carriers, including protestants, engage in similar practices as Strickland and England (La.) in the Shreveport-New Orleans arrangement, there being no facts of record to support such an assertion and the arrangement having no parallel to a true interline arrangement or commercial-zone delivery; that he erred in stating that Herrin is unlikely to be affected by approval; and that he erred in failing to include Chicago and St. Louis along with Memphis in the protective restrictions to be imposed, or in finding that the extra costs involved in circuity would relieve competition.

They state that Strickland would put the operating rights to be acquired herein to a totally new and different service

than that for which they were originally granted, and that the division sought would result in a confusing, illogical, and impractical carving-up of the rights of England (La.), which would permit the same service to be provided by as many as three different carriers, operating through overlapping commercial zones, where only one previously operated, and this in spite of the cumbersome and confusing restrictions which would be imposed by the examiner. They call amazing the granting of the Monroe-New Orleans route, an authority not even requested by applicants, and in an unfair result since it was not published as such and thus could not be anticipated or specifically opposed by protestants. The examiner's reliance upon the *Deaton-Lavender* case was improper, they charge, since that case actually restricted the operating rights granted while the recommended result herein would upgrade the irregular routes to regular route. And finally as to the section 5 application, they assert that no public need was shown for reinstitution of the dormant rights.

Specific exceptions to the section 207 application are that there was no evidence warranting conversion of the transferred irregular-route rights to regular route, there being a total failure to show public convenience and necessity but rather witnesses who expressed merely a desire as opposed to a need for Strickland's service; that the examiner erred in granting authority to service intermediate points on the routes granted since applicants did not seek it in their application nor was such request contained in the publication thereof; that there is no evidence to support the selection of the particular points granted; and that the examiner failed to make certain statutory findings respecting sections 207 and 214, which makes his report fatally defective. They assert that examiner also failed wholly to deal with certain issues and contentions raised by protestants on brief or to rule concerning certain requested findings of fact or conclusions of law.

The Copperstate applications.—Exceptions to the examiner's recommendation in the Copperstate applications are similar insofar as charges of actual and constructive dormancy, abandonment, and the reasonableness of the purchase price. Specifically, they charge that the operation by the England companies wholly in TOFC service between Houston and New Orleans constituted abandonment of highway operations, and the operating rights to that extent are therefore dormant. Also, they charge unlawfulness in the use of the irregular routes as regular routes, citing the *Brady* case, between Houston and New Orleans. Primary among their exceptions is that England (Tex.) conducted unlawful operations from Lake Charles to Houston, utilizing railroad service without authority, and that the examiner erred in characterizing this as lawful interchange or "pure railroad freight." They point out further that Copperstate has continued during temporary authority the unlawful operations formerly conducted by England (Tex.) by the same or other devices. They charge that the examiner erred in finding that these unlawful practices were not before the Commission in this proceeding.

Protestants also claim that the examiner erred in finding that the England companies moved traffic from New Orleans to Texas points in competition with Red Ball; that he erred in not finding that there was no public need shown for reinstitution of England's dormant service; that he erred in finding that Braswell could stand the additional competition which would be afforded by Copperstate; and that he erred in minimizing the effect of the loss of revenue to Ryder from traffic formerly interchanged with Copperstate at Houston.

With respect particularly to the section 207 application, protestants assert that applicants failed to sustain their burden of proof in showing public convenience and necessity for the requested authority, but only showed a desire

for the services of Copperstate coupled with the unfamiliarity as to other available services or comparatively minuscule complaints concerning them. They charge that the examiner erred in finding the services of Herrin and Ryder insufficient between Houston and Louisiana points or that Central and Red Ball would not be affected by the new regular-route service of Copperstate. They also charge that he erred in finding a need for westbound service by Copperstate from Lake Charles to Houston, particularly in finding that the proof of need for eastbound service reduces the quantum of required evidence of need for westbound service also. They charge that the examiner did not make the statutory findings that Copperstate is fit, willing, and able, which makes his report fatally defective, and that there is evidence in the record to the contrary, even if they had been made. Protestants state that there is no resemblance between the authority that the examiner recommends and that which presently exists in vendors, but that the examiner's recommendation seeks mainly to accommodate Copperstate.

REPLIES OF APPLICANTS.

Reply of Strickland and England (La.)—The joint reply in the Strickland applications states that protestants fail to submit any specific evidence of traffic which they would lose by approval; that the revenues and earnings for each protestant to the Strickland applications show significant gains for each during the period Strickland was operating a portion of the authority of England (La.) under temporary authority; that applicants filed promptly upon cessation of operations by England (La.) on April 30, 1964 and were not lax in seeking to obtain it but that approval could not be obtained from the Commission until October 5 of that year, following which Strickland promptly instituted operations; that the prior *Strickland-England* case,

negotiated in 1958, affords no basis for passing on the purchase price in this proceeding, arrived at in 1964 at public auction at which several of the protestants participated and helped to bid up the price to the level finally reached; that the earlier case was actually denied on grounds other than purchase price; that the proposed division of the authority of England (La.) is not confusing, illogical, and impractical—nor is it novel, but similar divisions have been approved by the Commission in several previous instances; and that the procedures employed in the Strickland-England interchange at Shreveport and New Orleans were carried on with the full knowledge of protestants and Commission employees. They request that the examiner's report be upheld but that one condition he would impose be removed: that which would require the Strickland and Copperstate transactions to be consummated simultaneously and that one not be consummated without the other. They state that the operating rights of England (La.) are readily divisible and could reasonably be consummated independently of each other.

Reply of Copperstate.—In its reply Copperstate also points out that the temporary dormancy in the operations of the England companies was not excessive or unusual, similar cases having been approved many times in the past; that the operations of England (La.) in the areas south of U. S. Highways 90, 165, 190 and 90 had been sufficiently frequent and widespread to meet the Commission's test of substantiality; that there were no knowing or willful unlawful operations by England; that Ryder made no specific showing of traffic that would be diverted to Copperstate following approval nor is any likely; that numerous shippers testified as to a need for new and additional service, citing complaints against existing service, including that of protestants; that Copperstate met its burden of showing a need for westbound service but simply showed less testi-

mony than as to east bound service; and that protestants present a confused argument as to whether the Houston-New Orleans service is regular route or irregular route, the matter being at best a borderline situation which Copperstate seeks to alleviate by seeking regular-route authority, one of the alternatives presented in the *Brady* case.

DISCUSSION AND CONCLUSIONS.

The Strickland applications.—First, we wish to reject the charge of actual dormancy in the England operations, notwithstanding the fact that circumstances surrounding of the precipitous cessation of operations in May 1964 raise the inference that the England companies were merely unwilling, rather than unable, to continue. The reason for a cessation of operations is not significant under section 5. We gave due consideration to this aspect of the case in the earlier actions for temporary authority, wherein the applications were at first denied, then granted upon petitions for reconsideration, which accounts for the fact that several months elapsed between the filing of the application and the reinstitution of operations. Such brief lapses of service are not unusual and have been present in applications approved in the past where temporary authority was granted, without constituting dormancy of the operating rights. However, we wish to emphasize that an application for temporary authority is decided without a hearing and without unnecessary delay. Approval of temporary authority is merely an acknowledgment on our part, in our discretion, that there is evident danger of injury to operating rights that are worth preserving. As the temporary authority order states, the grant raises no presumption as to action that may be taken subsequently under section 5 when we have had the benefit of more leisurely and detailed scrutiny of the proposed transaction.

This brings us to the matter of constructive dormancy, which for purposes of this inquiry may be defined as the conduct of operations that may not be considered because they were unlawful or not conducted in accordance with the Commission's rules and regulations. In this matter we do not agree that the arrangement of Strickland and England (La.) between Shreveport and New Orleans may not now be questioned because not challenged for 2½ years. The question of fitness is always before us in section 5 proceedings. *United States Van Lines, Inc.—Purchase—Bell,* 90 M. C. C. 362. Protestants urge that the arrangement was either an unlawful pooling of traffic and services or an unlawful control by Strickland of the operations of England (La.). We do not agree that the arrangement was either of these things. Our findings as to what arrangement constituted requires first that more detailed analysis of the actual operation be conducted.

The evidence shows that Strickland transferred loaded and sealed trailers to England (La.) at Shreveport for transport to New Orleans and at the latter point for transport in the opposite direction. In practice, Strickland notified England (La.) of how many trailers it would have on any given day at each end of the line segment, and England (La.) sent tractors to Strickland's terminals at New Orleans or Shreveport to pick them up. At the opposite end the trailer was delivered intact and still sealed to Strickland's terminal. In New Orleans Strickland broke bulk for distribution to other points, some of which was interchanged to other carriers (including England (La.) for delivery to certain points in Louisiana). At Shreveport the record is less explicit, but judging from the abstract of shipments submitted, presumably the trailer was then simply shifted to a Strickland tractor for movement to distant cities in the upper midwest and east. England (La.) cut no bills on the individual shipments nor was it shown

as a connecting carrier on Strickland's bills, except that some of the bills issued by Strickland on shipments transported in this manner bore a rubber stamp to show the routing. It did not pick up, deliver, nor participate in billing or claims as to the shipments. In fact, vendor's president testified that, in order to prepare his abstract of shipments as to traffic transported under this arrangement, it was necessary for him to secure the freight bills from Strickland at its New Orleans terminal, and they are listed in the abstract in groups under an England manifest which lists them by Strickland PRO numbers. England (La.) did not share in a pro-rata division on each shipment but received a flat sum for hauling a trailer, full or empty, between New Orleans and Shreveport. Most of these trailers used were Strickland's, a few were England's, but in neither case does there appear to have been any lease arrangement as to particular trailers, it being testified that England's trailers were "quickly absorbed into the trailer interchange."

This does not constitute interchange within the meaning of our rulings, nor is it any form of interlining as we define it. Interlining is the practice whereby a carrier transfers a *shipment* to another carrier at a point of joint service for delivery or for further movement and later interline with another carrier. Interchange is a kind of interline which involves the exchange of equipment, here trailers but often tractors and trailers with or without drivers. Compare *Gilbertville Truckign Co.* v. *United States,* 371 U. S. 115, 121. Usually interchange involves loaded vehicles, but in any form it is governed by the *Lease and Interchange of Vehicle Rules,* 49 CFR 307.[6] England and Strickland have not offered lease agreements covering such of Strickland's trailers as were used, and the flat charge for their

6. Previously designated 49 CFR 207; renumbered April 1, 1967, when all section designations in 49 CFR were increased by 100 numbers.

movement was the same no matter whose equipment was used. If for no reason than failure to comply with section 307.5(c) of those rules, the arrangement between applicants here was not a lawful interchange. That section requires an arrangement under which:

> * * * the rates charged and the revenues collected must be accounted for in the same manner as if there had been no interchange of equipment. Charges for the use of the equipment shall be kept separate and distinct from divisions of the joint rates or the proportions thereof accruing to the carriers by the application of local or proportional rates.

England (La.) had no liability to the actual shippers nor is there anything to suggest that England (La.) exercised control or responsibility over the traffic or that it functioned as an independent interchange carrier, as required by law. Because there was no lawful interchange, there was no lawful use of the rights of England (La.). Because the operations were really under the management and control of Strickland, insofar as the relationship with and liability to shippers was concerned, they constitute operations by Strickland without possession of a certificate.

We conclude that the Shreveport-New Orleans movements of loaded trailers handling traffic of Strickland purportedly under the rights of England (La.) were lawful. In addition, to the extent such traffic had a prior or subsequent movement by England (La.) between New Orleans and other Louisiana origins or destinations under the same irregular-route rights, unlawful cross-hauling was also involved. Such unlawfulness reflects adversely on the fitness of both applicants. Even if we did not so find, we note that applicants in a section-5 proceeding have the burden of proving that the vendor performed substantial and lawful movements under the rights involved in the transaction. *Dealers Transit, Inc.—Control and Merger,* 93

M. C. C. 611, 619. Applicants have not borne this burden. Whether this be pooling, interchange, or constructive control or lease by Strickland of the England (La.) rights, it was not authorized, not in compliance with our rules and regulations, and not lawful. Any way we slice the apple of the arrangement between applicants, it comes out wormy.

Applicants admit that the arrangement described was novel. Such admission coupled with their failure to ascertain, even if they did not prove, the lawfulness thereof, adds an element of willfulness. Such a conclusion is particularly significant since a previous effort by Strickland to find a short way to move traffic from the midwest to New Orleans had been found unlawful in the *Gordons-Strickland* complaint case. There speculative use of another "novel" arrangement after that experience borders on foolhardiness.

While we have sometimes approved applications under section 5 despite unlawful prior operations of vendor, such a finding is generally where vendor but not vendee committed the violations, where the operations were conducted under color of right in the honest belief that they were lawful, where an overriding public need for lawful future operations was shown, or where all such elements were present. Here none of these exceptional conditions seems to exist.

We cannot agree with applicants and the examiner that any reasonable interpretation of the previously mentioned letters from the local supervisor for this Commission authorizes the cross-radial movements through New Orleans. The unlawfulness of such practices has been discussed, defined, and prohibited in cases too numerous to mention since 1941 or earlier. Nor does the fact that shipments were turned back to Strickland before being interlined again to England (La.) relieve the unlawfulness. *Colonial Refrigerated Transp., Inc., Ext.—Several States,*

79 M. C. C. 57, 63. No color of right can be considered plausible here either.

The shipper testimony here is mostly from shippers far distant from the routes involved, shippers who have many alternative methods of handling their traffic. Even those whose traffic is more local to the area seem to have no real complaints of inadequate service from existing carriers. Without support of lawful prior operations involving similar traffic, the testimony of shippers supporting the Strickland application does not show any public convenience and necessity such as to mitigate or excuse the unlawfulness of both the applicants in their joint operations.

There remains the question of whether there are any other operations of England (La.) that can be found sufficient to support a finding of an active and continuous service such as would warrant approval of the application. Insofar as the portion of England's operations involved in the Strickland application are concerned, the only other active service shown was between New Orleans and Monroe, via Alexandria, where vendor testified it operated one truck daily. We are not overly concerned with the fact that England (La.) might have operated irregular-route authority as regular route, since under recent rules this would simply mean that England (La.) should have initiated steps to convert the authority on the basis of the changed usage. But we do note that the service performed appears from the evidence to have been strictly a distribution service from New Orleans of shipments received in interline from long-line carriers, including Strickland. This becomes very important when the use to which Strickland would put this authority following approval is considered and also raises the specter of cross-hauling again.

It is clear that the examiner sought to resolve the difficult set of circumstances in this application by recommending the transfer only of those rights of England (La.) that

had been shown to have been operated, while taking recognition of the different use to which the rights would be put. Thus, he would approve and convert in one action while taking notice of the result which would occur when Strickland rights under lease to Burks were regained and the route via Monroe would thus become vastly more important than via Shreveport, a situation which has now arrived. He would blunt this new service prospect somewhat by restricting the Monroe route against New Orleans-Memphis traffic.

Ingenious as this solution appears, it cannot meet with our approval. Conversion of a portion of England's irregular route rights to a regular route without any request by applicants or publication to the public is a result that could not be anticipated by protestants nor does it give them opportunity to show the adverse effect of such an approval. Moreover, the effects of such a move, providing the final link over the Monroe gateway in a regular route extending from Boston to New Orleans would create a service which is so vastly different from the simple peddle service provided by England out of New Orleans that an entirely new and different service would be created, which could not but have an adverse effect on the existing competitive situation. Nor does restricting the authority granted against Memphis-New Orleans traffic, as the examiner recommends, furnish a solution to the effect on traffic to other points. As we found in the *prior Strickland-England* case, the acquisition of England's irregular route rights by Strickland and conversion to a link in its long-line regular routes would be of little public benefit and would be certain to harm the operations of existing carriers. The application in No. MC-F-8798 under section 5 will be denied for all the foregoing reasons.

As the application under section 207 in No. MC-59680 (Sub-No. 142) was made directly related to and contingent

upon approval of the section 5 application, it must also be denied.

The Copperstate applications.—The previous discussion applies equally to the Copperstate applications insofar as contentions of dormancy based upon cessation of operations are concerned. Copperstate, like Strickland, began operations promptly following the grant of temporary authority in October, 1964, a not unduly long period of time after England's cessation of operations. More subtle is the charge that England's operating rights over-the-highway were abandoned by the exclusive use of substituted rail service between Houston and New Orleans. Protestants cite the finding of the court in the review of the *Piggyback Rules* case as authority for this contention.

While it is true that the court in reviewing the *Piggyback Rules* case did express its view that a certificate to operate over the highways as a motor carrier did not authorize, nor was it utilized by the use of, substituted TOFC service, we are not inclined to accept that interpretation in this context. Not only is the court's decision in the *Piggyback Rules* case currently pending on appeal to the Supreme Court, and thus not finally decided, but the right to utilize TOFC service for all or a portion of its lines-haul operations was expressly provided in Rule 4(e),[7] a rule which was not under attack in that review of the case,[8] and thus the issue cannot be considered to have been finally determined. Moreover, the issue of whether motor carriers can lawfully utilize TOFC service for all or a portion of its line-haul movement is currently on review in the courts on

7. Rule 4(e), 49 CFR 500.4(e) states: "Where joint intermodal TOFC service is to be performed in lieu of a motor or water carrier's authorized all-highway or all-water route, tariffs embracing rates or charges covering such service may provide for the performance of TOFC service for the entire line-haul movement."

8. In the court's introduction to its opinion, it stated that plaintiffs in the action sought only to nullify rules 2, 3, 5 and 7.

a separate appeal from the *Piggyback Rules* case, brought in the United States District Court for the Northern District of Texas.[9] The latter review has been heard but no decision has been rendered as of this date. Unless and until we are faced with a final rejection of Rule 4(e), we prefer to stand by the rule and the reasoning in the *Piggyback Rules* case under which it was promulgated. Accordingly, the operations of the England companies in substituted service between Houston and New Orleans, to the extent that they were lawful, support the contention that the England companies' use of their rights was active and continuous, and such service does not constitute abandonment of its over-the-road rights such as would support a finding of dormancy.

This brings us to the issue of lawfulness in the combined operations of the England companies, particularly as regards the alleged interchange at Lake Charles. We have indicated in our statement of the facts that eastbound movements can be regarded to have been constructively interchanged between England (La.) and England (Tex.) at that point despite the fact that the flatcar moved through Lake Charles directly to New Orleans without physical handling or interruption of any sort. This is influenced by the fact that the two companies are under common control and management, operating in a coordinated service such as they could perform, if they wished, on nearby highways. Moreover, the indicia of interline is present in that England (Tex.) delivers the trailer to Southern Pacific in Houston, and England (La.) picks it up in New Orleans, each usually cutting its own bills for its share of the operation and participating in a division of the revenue from each shipment as in interline situations.

But the reverse operation strains our credulity. Here

9. Civil Action No. 4-355, *Lone Star Package Car Co., et al.* v. *United States.*

England (La.) quite legitimately consigned its trailer to Southern Pacific at New Orleans for transport to Lake Charles on flatcar, but we cannot conceive that the freight was interlined to Southern Pacific at that point or became "pure railroad freight" to Houston on the facts shown. It is admitted by applicants that Southern Pacific did not physically handle the freight or trailer in any way, cut bills, share in the revenues (except for its contracted TOFC charge), deliver, or in any way participate in any shipment, its function ending when it removed the trailer from its flatcar at Houston and placed it in its yard, still sealed, for pickup by England (Tex.).

Moreover, even if we were to accept this concept of interline with Southern Pacific, the role of England (Tex.) at Houston becomes incompatible, since England (Tex.) took charge of the trailer completely, broke bulk, delivered, and interlined with other carriers for points beyond Houston, all in its own name. Since England (Tex.) held no operating rights from Lake Charles to Houston, and since the movement between those points took place ostensibly under Southern Pacific's authority, its position could be at best that of a terminal carrier operating pursuant to section 202(c)(2) of the act[10] under the direction and responsibility

10. 49 U. S. C. 302(c)(2). Section 202(c)(2) reads as follows:

• • • (c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

• • • (2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service: but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

of Southern Pacific. Neither the TOFC contract nor the methods by which the principals operated give support to any such theory. The conclusion is inescapable that England (Tex.) was engaged in operations from the Texas-Louisiana State line to Houston for which it held no operating authority. These operations were thus unlawful and may not be considered.

This is not the forum to decide whether Southern Pacific participated, knowingly or unknowingly, in a violation. Since the railroad did not appear at the hearing to explain its version of the purported interchange, we must accept at face value its statement in the TOFC contract that it was performing only a contractual TOFC substituted service for England (Tex.) between Lake Charles and Houston. In so doing it evidently provided a substituted TOFC service for a motor carrier which had no authority to perform such service. Although railroads are under no obligation to police the operations of motor carriers with respect to their certificates, when they enter into substituted rail-for-motor arrangements with such carriers, they should satisfy themselves that the motor carriers have authority to transport the commodities concerned between the points where the service is to be performed. *Movement of Highway Trailers by Rail,* 293 I. C. C. 93. This principle was reiterated in the *Piggyback Rules* case, at page 365. The record is cloudy as to whether Southern Pacific is presently performing such service for Copperstate under temporary authority, and if so under what arrangement. It was stated that Copperstate continued to operate in TOFC service from Lake Charles to Houston for a brief period following the initiation of temporary operation of the rights of England (Tex.); and there is inference that it continues to do so on occasion. If so, this practice should be immediately halted, unless such operations are all-rail movements from Lake Charles to Houston, and so billed to shippers and consignees.

As to the service which the England companies performed, either lawfully or unlawfully, between Houston and New Orleans, the evidence is that it consisted largely of water-borne truckload traffic received from Sea Land service as opposed to general interline operations with other motor carriers. They did not operate directly to other Texas points nor was the traffic which England (Tex.) interlined at Houston with other carriers a significant factor—certainly not when compared with the new and totally different service or the magnitude of use which would occur with the operating rights in the hands of Copperstate, a carrier with rights extending to the Pacific Coast.

The evidence also shows that England (La.) has likewise operated an unlawful cross-radial haul of New Orleans on traffic bound from Baton Rouge to Houston. While it has authority to operate *from* New Orleans *to* Baton Rouge, it has no direct authority for a return movement except by utilization of the New Orleans based radial right. The only rationale, therefore, on which the movements could have been performed was the aforementioned letter from the supervisor which England (La.) interpreted as authority to conduct a cross-haul operation. However, it appears that Copperstate, following the institution of temporary authority, continued such unlawful movements and informed the examiner at the hearing that it would continue to solicit traffic at Baton Rouge for movement west of New Orleans "until told by the Commission to stop." We believe that a carrier of the size and experience of Copperstate should not have to be told to stop an unlawful operation, particularly when the unlawfulness has been brought to its attention. The conduct of an operation for which no authority exists, and in addition, the brash statement of its intention to continue the unlawful movement constitutes a willful and defiant disregard for regulation which brings

the fitness of Copperstate into question. If any question presently exists, England (La.) and Copperstate are directed to discontinue the unlawful movement from Baton Rouge to points beyond New Orleans unless and until appropriate operating authority therefor has been obtained and a certificate issued.

On the basis of the use to which the operating rights sought by Copperstate were put by the England companies prior to this transaction, coupled with the substantial unauthorized carriage both before and during temporary authority, and the greatly differing use to which those rights would be put following approval, we feel that the transaction in No. MC-F-8808 would not be in the public interest and will be denied.

No. MC-22167 (Sub-No. 21).—Having found that the purchase by Copperstate should be denied, the remaining issue is whether the application in No. MC-22167 (Sub-No. 21) may nevertheless be approved. We may properly consider such an application when related to or accompanying (but not wholly dependent upon) a section-5 application notwithstanding that the section-5 application has been denied. *Rocket Transport, Inc.—Purchase—Bush Transfer, Inc.*, 87 M. C. C. 285. In so doing, however, the issue must be determined solely upon the question of public convenience and necessity, as provided in section 207 of the act, without respect to the accompanying section-5 application.

Copperstate introduced a total of 90 shipper witnesses, two traffic associations, and three other motor carriers, all of which gave testimony in support of the application. The traffic associations, representing the interests of New Orleans and Portland, Oreg., shippers, gave general support to the Copperstate applications on behalf of their members. The three motor carriers all serve points in the southeastern United States, terminating at New Orleans on the west, and support the application for the purpose of

interline connection from that point to Texas points and the west coast. The 90 shippers are of a wide range of commodities, and are located in Louisiana, including New Orleans and Baton Rouge, Texas, Arizona, California, and Oregon. The hearing examiner, in appendices H, I and J to his report, has ably summarized the testimony of the various shipper witnesses as to their reasons for needing Copperstate's service, and those appendices are hereby incorporated herein by reference. In them, the testimony is separated on the basis of the direction of movement, origin, and destination sought, as follows—

> Appendix H—Analysis of shipper and receiver evidence supporting Copperstate application No. MC-22167 (Sub-No. 21), for westbound service from such points in Louisiana as Baton Rouge, New Orleans and other points on the requested regular routes in Louisiana to Houston and beyond.
>
> Appendix I—Analysis of shipper and receiver evidence supporting Copperstate application in No. MC-22167 (Sub-No. 21) for eastbound service from Houston and points west thereof directly to Baton Rouge and other points in southern Louisiana located on the requested routes even though they also ship to Lake Charles, New Orleans, and points within 10 miles of New Orleans.
>
> Appendix J—Analysis of shipper and receiver evidence supporting eastbound service to Beaumont, Tex., Lake Charles, New Orleans, La., and points within 10 miles of New Orleans from—
>
> (1) Houston, itself,
>
> (2) points in Texas located on the regular routes of Copperstate, and
>
> (3) points located on the regular routes of Copperstate west of El Paso.

The total number of summaries is larger than the total number of shippers, since certain of them expressed a need

for service in more than one category. Our evaluation of this testimony is on the same bases.

The testimony of 15 shippers and receivers of freight are included in appendix H, some of them shippers from the New Orleans and southern Louisiana area, and the others, receivers of freight at west Texas points. Nearly all stated a preference for the service of Copperstate based upon its promise of a faster and more direct service—for example, a second morning service from New Orleans to west Texas. On cross-examination, one shipper was unable to show, however, that the service he had received from Copperstate was significantly different from the service he had received from other carriers. Five of them expressed minor dissatisfactions with existing carriers such as occasional late pickups, difficulty in securing proper equipment, or trouble in tracing shipments. Six expressed satisfaction with existing carriers, and several admitted that they were unfamiliar with or had not used the service of available carriers. The best support in this category is one shipper which uses private carriage to the west coast and will not (under its company policy) use any common carriage which involves a two-line interchange service. However, this carrier uses Herrin to Dallas and is quite satisfied with that carrier. Two of the shippers had been served unlawfully from Baton Rouge to Texas points under temporary authority by Copperstate.

Appendix I, comprises the testimony of 56 shippers, of which 4 are receivers of freight at New Orleans and Baton Rouge from Houston, and the remainder are shippers, 23 from Houston, 7 from other Texas points, 27 from California, 2 from Arizona, and 2 from Oregon. Most stated a preference for Copperstate. Nineteen expressed minor dissatisfactions with existing carriers, such as difficulties in tracing and too late (or too early) pickups. Most also used existing carriers, Braswell, Herrin, or Ryder for the

most part, and many of them were satisfied with their service—or at least expressed no dissatisfaction with it. Eleven stated that they had already diverted their traffic to Copperstate under temporary authority or intended to divert based upon Copperstate's promise of a faster or single line service. Some of them were unfamiliar with the service of existing carriers. Many expressed the usual desire of shippers for extra carriers or for a single line service, in this case to New Orleans from California or Oregon. Seven stated a desire for service beyond Louisiana to southeastern points which would necessitate interchange by Copperstate at that point with other carriers.

Appendix J is divided into 3 groups of shippers. The first, comprising 7 shippers, seeks Copperstate's service only from Houston to Beaumont, Lake Charles, or New Orleans. One seeks only an extra carrier in addition on to those directly available, two of them use and are satisfied with Herrin, three have minor complaints against existing service, two complained that certain carriers are not interested in their traffic, several have diverted their traffic to Copperstate from existing carriers under temporary authority, one seeks service beyond New Orleans, and two expressed no dissatisfaction with existing service. The second group, 12 shippers, seeks service from other Texas points to New Orleans and most state a preference for Copperstate. Two seek principally a single-line service to New Orleans and three express a desire for service beyond New Orleans. Five have minor complaints with existing service, two have already diverted to Copperstate, and three use other carriers with whom they are generally satisfied. One showed no continuing need for any service.

The third group in appendix J, comprising 51 shippers, is located west of El Paso. Most are in California and the rest in Arizona or Oregon. Most of them have in the past been Copperstate shippers in joint line service at Houston

and have no complaints with that service, although they would prefer to have Copperstate furnish a single-line service. Most also use other single- and joint-line carriers for the same service with only a few complaints. Twenty want service either partially or predominantly beyond New Orleans. Nineteen had already diverted to Copperstate's single-line service to New Orleans in place of its joint-line service or that of other carriers.

We have given great consideration to the fact that a large number of shippers have testified in favor of Copperstate's extended service to New Orleans. Nevertheless, we conclude that the public convenience and necessity has not been shown for the institution of such service by Copperstate nor have these shippers shown a need for any service that cannot be supplied by existing carriers. Reduced to its essentials, the numerous shippers have simply expressed a preference for Copperstate, seek additional carriers in addition to those already available, or seek a single-line service over a longer distance. Preference is not a substitute for need where an area is served adequately by established carriers. The mere showing by an applicant of its own fitness and of the shipper's desire to use its proposed service are not sufficient of themselves to warrant a grant of the authority sought. *Carolina Haulers, Inc., Contract Carrier Application,* 76 M. C. C. 254. There is presently an abundance of service between Houston and New Orleans, two of the nation's major population centers, both by protestants and other carriers alluded to in the record. Testimony of record also shows that much of the traffic that Copperstate would generate (or has already generated) would be at the expense of existing carriers. Ryder, in particular, showed that a substantial amount of traffic which it formerly received in interline at Houston from Copperstate has been diverted to the latter's single line service under temporary authority. We recognize a ship-

per's natural inclination to prefer to have available as many motor carriers as possible to serve it. But it is incumbent upon us before authorizing a new service to be reasonably certain that a public need exists for such operation which cannot be met adequately by existing transportation facilities. *Dallas & Mavis Forwarding Co., Inc., Ext.—Toledo to Nebr.*, 76 M. C. C. 273.

Nor is the desire for a single-line service, particularly from points located more than half a continent away from the destination in question, of compelling significance. The Commission has usually held that shippers are not entitled to single-line service where satisfactory and adequate joint line service is available. *Watkins Motor Lines, Inc., Ext. —Canned Goods—Iowa*, 74 M. C. C. 795. Interline service between two, or even among three carriers, cannot be said to be per se inadequate, particularly where, as here, transportation is sought to very distant points. *Curtis, Inc.* v. *United States*, 225 F. Supp. 894. Moreover, many of these shippers who desire a single-line service from west coast points to New Orleans actually seek service largely beyond New Orleans to points in the southeastern States, which means that interline would be required at New Orleans in any event. In these circumstances it seems hardly of consequence to these shippers whether interline, on what is practically a transcontinental movement, occurs at Houston or New Orleans. The lack of need shown for an extension of Copperstate's authority, coupled with the questionable aspect of its fitness in conducting temporary operations impel us to deny the application for new authority under section 207.

We find, in No. MC-F-8798, that the transaction proposed has not been shown to be consistent with the public interest and that the application accordingly should be denied.

We further find, in No. MC-59680 (Sub-No. 142), that the public convenience and necessity has not been shown

to require operation by Strickland Transportation Co., Inc., as a motor common carrier of general commodities, with exceptions, over a regular route, between Shreveport and New Orleans, La., and that application will accordingly be denied.

We also find, in No. MC-F-8808, that the transaction proposed has not been shown to be consistent with the public interest and that the application should be denied.

We further find, in No. MC-22167 (Sub-No. 21) that the public convenience and necessity has not been shown to require operation by Consolidated Copperstate Lines, as a motor common carrier of general commodities, with exceptions, over regular routes, between Houston, Tex., and New Orleans, La. and that application will accordingly be denied.

An appropriate order will be entered.

COMMISSIONER BROWN, dissenting:

I disagree with the majority and would approve the applications along the lines recommended by the hearing examiner. In my opinion these cases are being decided, at least to a great extent, upon technicalities or issues not raised by the parties. For example, the majority relies heavily upon its interpretation of section 307.5(c) of the Lease and Interchange of Vehicles Rules to find the Strickland-England interchange arrangement unlawful. At the same time, no thought has been given to section 307.5(a) of those rules, which provides that "the use to be made of the equipment and the consideration for such use" shall be set forth in the interchange agreement. While the report states that "England and Strickland have not offered lease agreements," the fact of the matter is that no one asked them to do so. I therefore, would not condemn them for failing to fulfill a request that was never made.

The Copperstate cases likewise contain a vast amount of evidence which I believe warrants much better treatment than accorded by the majority.

In conclusion, I feel that substantial evidence was offered by applicants in these cases and that, contrary to the majority, it should not be treated as a porous product or one which will hold no more water than a crocheted bathtub.

CHAIRMAN TUCKER, whom COMMISSIONER DEASON and STAFFORD join dissent.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 31st day of July 1967.

No. MC-F-8798

STRICKLAND TRANSPORTATION CO., INC.—PURCHASE (PORTION)—ENGLAND TRANSPORTATION CO., INC.

No. MC-59680 (Sub-No. 142)

STRICKLAND TRANSPORTATION CO., INC., EXTENSION—NEW ORLEANS

No. MC-F-8808

CONSOLIDATED COPPERSTATE LINES—PURCHASE (PORTION)—ENGLAND TRANSPORTATION, INC., AND ENGLAND TRANSPORTATION COMPANY OF TEXAS

No. MC-22167 (Sub-No. 21)

CONSOLIDATED COPPERSTATE LINES, EXTENSION—NEW ORLEANS

Investigation of the matters and things involved in these proceedings having been made, and the said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereof, which report is hereby made a part hereof:

It is ordered, That the applications, be, and they are hereby, denied, and that this order shall be effective 60 days from the date it is served; and

IT IS FURTHER ORDERED, That the authority granted by the orders of September 30, 1964, in Nos. MC-F-8798 and MC-F-8808, as amended by orders of February 5 and 15, 1965, in No. MC-F-8798 and by order of February 15, 1965, in No. MC-F-8808, for temporary lease of the operating rights of England Transportation Co., Inc., and of England Transportation Company of Texas, shall be of no further force and effect at the expiration of 60 days from the date this order is served.

By the Commission.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX C.

INTERSTATE COMMERCE COMMISSION

Served May 16, 1966

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D. C., and served on all parties in interest within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of such exceptions. At the expiration of said period for the filing of exceptions, the recommended order will become the order of the Commission and will become effective unless exceptions have been seasonably filed or the order has been stayed or postponed by the Commission. If exceptions are filed, replies to exceptions may be filed within 20 days after the final date for filing of exceptions. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice or order to that effect has been served.

No. MC-F-8798[1]

STRICKLAND TRANSPORTATION CO. INC.—PURCHASE (PORTION) —ENGLAND TRANSPORTATION CO., INC.

Decided.....

1. In No. MC-F-8798, purchase by Strickland Transportation Co., Inc., of certain operating rights of England

1. This report also embraces Nos. MC-59680 (Sub-No. 142), Strickland Transportation Co., Inc., Extension—New Orleans; MC-F-8808, Consolidated Copperstate Lines—Purchase (Portion) —England Transportation Co., Inc., and England Transportation Company of Texas; and MC-22167 (Sub-No. 21), Consolidated Copperstate Lines Extension—New Orleans.

Transportation Co., Inc., and acquisition by L. R. Strickland of control of the operating rights through the purchase, approved and authorized, subject to conditions.

2. In No. MC-59680 (Sub-No. 142), public convenience and necessity found to require operation by Strickland Transportation Co., Inc., in the transportation of general commodities, over a regular route, between Shreveport and New Orleans, La. Issuance of a certificate approved and authorized subject to conditions.

3. In No. MC-F-8808, the purchase by Consolidated Copperstate Lines of certain of the operating rights and property of England Transportation Co. Inc., and of the operating rights of England Transportation Company of Texas, and acquisition by Horace W. Steele, Service Tank Lines, Cornel G. Allen and Walter B. Allen of control of the operating rights and property through the purchase, approved and authorized, subject to conditions.

4. In No. MC-22167 (Sub-No. 21), public convenience and necessity found to require operation by Consolidated Copperstate Lines in the transportation of general commodities, over regular routes, between Houston, Tex., and New Orleans, La. Issuance of a certificate approved and authorized, subject to conditions.

W. T. Brunson, David Axelrod, Leonard R. Kofkin, and *R. Douglas Coffin* for applicants.

A. R. Allen for intervener.

Bob W. Fleming, M. Ward Bailey, Louis I. Dailey, Rollo E. Kidwell, Leroy Hallman, Phineas Stevens, Charles D. Mathews, Mert Starnes, Oscar P. Peck, William F. Goodwin, Reagan Sayers, Hugh T. Matthews, Charles R. Ford, and *R. Y. Schureman* for protestants.

REPORT AND ORDER.

RECOMMENDED BY ELDEN J. MILLER, HEARING EXAMINER

By joint application filed in No. MC-F-8798 on July 1, 1964, Strickland Transportation Co., Inc., of Dallas, Tex., and England Transportation Co., Inc., a Louisiana corporation, of New Orleans, La., herein called England, seek authority under section 5 of the Interstate Commerce Act for the purchase by the former of certain of the operating rights of the latter for $495,000. In the same application, L. R. Strickland, also of Dallas, who controls Strickland through ownership of stock, seeks authority under the same section to acquire control of the operating rights through the purchase.

By another application filed December 7, 1964, in No. MC-59680 (Sub-No. 142), and as a matter directly related to the transaction proposed in No. MC-F-8798, Strickland seeks a certificate of public convenience and necessity under section 207 of the act authorizing operations in interstate or foreign commerce in the transportation of general commodities, with exceptions, between New Orleans and Shreveport, La., over U. S. Highways 61, 190 and 71, serving no intermediate points but serving off-route points within 10 miles of New Orleans, in lieu of authority it seeks to purchase from England of Louisiana between the same points but over irregular routes, as more completely shown in Appendix A.

By a tripartite application also filed July 7, 1964, in No. MC-F-8808, Consolidated Copperstate Lines, a California corporation, of Montebello, Calif., herein called Copperstate, England, England Transportation Company of Texas, a Texas corporation, of Houston, Tex., herein called England of Texas, seek authority under section 5 for the

purchase by Copperstate of certain operating rights and property of England and of the operating rights of England of Texas for a total consideration of $400,000. In the same application, Horace W. Steele and Service Tank Lines, Inc., owners of 50 percent of the stock of Copperstate, and Cornel G. Allen and Walter B. Allen, who control Service Tank Lines through ownership of stock, seek authority under the same section to acquire control of the operating rights and property through the transaction.

By another application filed December 21, 1964, in No. MC-22167 (Sub-No. 21), Copperstate seeks a certificate of public convenience and necessity under section 207 of the act authorizing operations in interstate or foreign commerce in the transportation of general commodities, with certain exceptions, over two regular routes, between Houston and New Orleans, serving the intermediate point of Beaumont, Tex., all intermediate points in Louisiana and off-route points within 10 miles of New Orleans as set forth in Appendix B. This application is not "directly related" to the transaction proposed in No. MC-F-8808. The authority is requested however, contingent upon approval of that transaction.

The motor-carrier applicants and protestants hereinafter named operate in interstate or foreign commerce, as motor common carriers of general commodities, over regular and irregular routes. Vendee-applicants separately operate in excess of 20 motor vehicles in transportation subject to part II of the act.

The applications in Nos. MC-F-8798 and MC-F-8808 were referred to the examiner for hearing and the recommendation of appropriate orders accompanied by the reasons therefor. The application in No. MC-59680 (Sub-No. 142), was referred to Joint Board No. 164 (Louisiana) and the application in No. MC-22167 (Sub-No. 21), was referred to Joint Board No. 32 (Texas and Louisiana) for concurrent

hearings with the two finance proceedings. Because the joint boards failed to appear the section-207 applications were referred to the examiner for hearing and the recommendation of appropriate orders accompanied by the reasons therefor. The four proceedings were called for hearing on a common record. They contain related issues and will be disposed of in one report and separate recommended orders.

At the hearing three motor carriers shown in the margin[2] opposed only the applications in Nos. MC-F-8798 and MC-59680 (Sub-No. 142), hereinafter sometimes called the Strickland applications, five motor carriers opposed all four applications,[3] and six motor carriers[4] and the Texas Railroad Assocation[5] opposed the applications in Nos. MC-F-8808 and MC-22167 (Sub-No. 21), hereinafter sometimes called the Copperstate applications. Separate briefs were filed by Strickland and Copperstate. A joint brief was filed by all protestants except Saia and the intervening railroads and their motor-carrier subsidiaries.

Temporary Authority.

No. MC-F-8798: Pursuant to an order entered in this proceeding on September 30, 1964, as amended by orders of February 5 and February 15, 1965, Strickland has leased

2. Campbell Sixty-Six Express, Inc., Arkansas-Best Freight System, Inc., and the former Delta Motor Lines, Inc., which was merged in Arkansas-Best on July 6, 1965.

3. Braswell Motor Freight Lines, Inc., Gordons Transports, Inc., East Texas Motor Freight Lines, Inc., Herrin Transportation Co., and Red Ball Motor Freight, Inc.

4. Ryder Truck Lines, Inc., Red Arrow Freight Lines, Inc., Saia Motor Freight Lines, Inc., Western Gillette, Inc., Brown Express, Inc., and Central Freight Lines, Inc.

5. Including 11 railroads operating in Texas, and Missouri Pacific Truck Lines and the Texas and Pacific Motor Transport Company, motor-carrier subsidiaries of the Missouri Pacific and T & P railroads, the four carriers being under common control and management.

at a rental of $7,425 a month until final determination of this section-5 proceeding those portions of the operating rights of England authorizing operations in Louisiana in the transportation of general commodities, over irregular routes, (a) from New Orleans and Plaquemine to Kentwood, Amite and Clinton, and (b) between New Orleans and points within 10 miles of New Orleans, on the one hand, and, ~~on~~ the other, points in Louisiana which are north only of a line beginning at the Mississippi-Louisiana State line and extending west along U. S. Highway 90 to its junction with U. S. Highway 190, thence along that highway to its junction with U. S. Highway 165 at Kinder, thence along the latter highway to its junction with U. S. Highway 90 near Iowa, and thence along U. S. Highway 90 to the Louisiana-Texas State line. Rentals paid during temporary authority would be applied as partial payment of the purchase price in event of approval and consummation. Temporary operations were commenced by Strickland on October 5, 1964.

No. MC-F-8808: Pursuant to an order entered in this proceeding on September 30, 1964, as amended February 15, 1965, Copperstate has leased until final determination of this section-5 proceeding (1) those portions of the operating rights of England authorizing the transportation of general commodities, with exceptions, over irregular routes, from New Orleans and Plaquemine to Baton Rouge, Thibodaux, Ponchatoula and Hammond, and between New Orleans and points within 10 miles of New Orleans, on the one hand, and, on the other, points in Louisiana *on* and south of a line beginning at the Mississippi-Louisiana State line and extending along the highways described in the preceding paragraph to the Louisiana-Texas State line; and (2) of that portion of the operating rights of England of Texas authorizing the transportation of general commodities, with exceptions, over irregular routes, from

Houston to Arlington and Woodville, Tex., and Lake Charles, La., at a total rental of $2,500 per month for lease of the operating rights, and at a month rental "equal to the monthly lien payments on certain equipment" being leased from England. Temporary operations were commenced by Copperstate on October 28, 1964. The operating equipment included in the lease to Copperstate consists of 8 trucks, 33 tractors and 16 trailers. As of the date of the execution of the purchase agreement between Copperstate and the England companies in July of 1964, the total balance due on the motor vehicle equipment was $114,727.91 which included interest due as of that date. The monthly payment due next after that date was $5,834.29 but successive monthly payments would have been reduced by the reduction in interest due thereon. Under the terms of this agreement for the lease of the motor vehicle equipment Copperstate would make the monthly payments including principal and interest until such time as those rental payments aggregated $105,000 after which it would lease the same equipment at a monthly rental of $1 until final determination of the section-5 application. Rental payments for lease of the operating rights would be applied as partial payment of the purchase price in event of approval and consummation.

History of Vendor Companies.

England: England was incorporated in Louisiana in 1942. On May 18, 1950, a certificate was issued to it in No. MC-57946 (Sub-No. 2), authorizing operations as a motor common carrier of general commodities, with exceptions, over irregular routes, wholly within Louisiana, (1) from New Orleans and Plaquemine (a) to Baton Rouge and Thidobaux and (b) to Ponchatoula, Hammond, Kentwood, Amite and Clinton, and (2) between New Orleans and Plaquemine; and on September 22, 1950 another certificate

was issued to it in No. MC-57946 (Sub-No. 3), authorizing similar operations over irregular routes (1) of similar commodities between New Orleans and points within 10 miles of New Orleans, on the one hand, and, on the other, points in Louisiana except from New Orleans to points named in (1)(a) above; and (b) between New Orleans and Plaquemine, and (2) of composition pipe and their connections and fittings from Marrero, La., to points in Mississippi on and south of U. S. Highway 80. It holds (or held) Louisiana intrastate operating rights which it has agreed to sell for $55,000 to persons not involved herein. It has sold its rights to transport pipe from Marrero for $7,000.[6]

Under England's combined authorities certain limited through operations are lawfully permissible and certain ones England has conducted in the past are forbidden. The seven destination points England is authorized to serve from New Orleans under its Sub-2 authority may be served on interstate traffic which England may have obtained at New Orleans, or at any other points in Louisiana so long as that traffic was physically moved via New Orleans. England could also receive traffic at Plaquemine, one of the seven points; and transport it to any Louisiana point so long as it was physically transported via New Orleans. These movements are lawfully permissible under the doctrine permitting the tacking of one grant of authority with another where physical operations are performed through the tacking point. In this case New Orleans.[7] England

6. Approved at a purchase price of $7,000 in No. MC-F-8842 on June 4, 1965, and consummated July 6, 1965. Callaway stated this purchase price as $7,500 (Tr. p. 48) and protestants state it is $75,000 (brief, page 69).

7. *Rushing Common Carrier Application*, 84 M. C. C. 430 (1961), held "where a common carrier holds two separate and unrestricted irregular route authorizations (whether emanating from one proceeding and contained in one certificate or more than one), which authorizations have a common point to which the carrier may transport a given shipment under one authorization and from which he may transport the same shipment under the other, the

holds no authority, however, to transport traffic from and to any other two Louisiana points such as from Shreveport to Houma, Lake Charles, etc., as any movement performed by England from Shreveport or from other similar points to New Orleans, to its 10-mile radius or to any of the seven enumerated points would exhaust all of its authority as to the movement of that shipment. A movement from say Shreveport or Baton Rouge to Lake Charles would be a forbidden cross-haul of its Sub-3 radial territory as condemned in *Jack Cole Co., Incorporated, Common Carrier Application,* 32 M. C. C. 199 (1942). See also *Gay's Express, Inc.* v. *Marvin J. Haigis and Kneeland G. Nichols,* 43 M. C. C. 277 (1944).

England of Texas: Prior to July 1, 1961 and until May 13, 1963, the name of this carrier was D. A. Beard Truck Lines. On the first date mentioned C. L. Callaway, of Dallas, Tex., acquired its stock as well as that of England for $220,000. On May 13, 1963, its name was changed to England Transportation Company of Texas. It holds a certificate from this Commission issued in the new name on March 17, 1964, under No. MC-2960 (Sub-No. 1), covering the transportation (1) of general commodities, with certain exceptions, over irregular routes, from Houston to Lake Charles and Shreveport, and points in Texas on and east of a line beginning at the Red River (the boundary between Oklahoma and Texas) and extending along U. S. Highway 277 via Wichita Falls to Abilene, thence along U. S. Highway 83 (formerly a portion of U. S. Highway 277) to its junction with U. S. Highway 67 (formerly a portion of U. S. Highway 277) at or near Ballinger, thence along U. S. Highway 67 to San Angelo, thence along U. S. Highway 87 to San Antonio, and thence along U. S. High-

carrier may furnish through service on the shipment under a combination of the two authorizations, provided the shipment is transported through the common point. *Aetna Freight Lines, Inc. Interpretation of Certificate,* 48 M. C. C. 610."

way 81 to Laredo; and (2) of cotton and cotton linters, wool and mohair, over irregular routes, from Lake Charles, Shreveport and points in the Texas destination territory described above, to Houston.

The operating rights of England of Texas and those of England connect at Lake Charles where they have interchanged freight. Through service is permissible under a combination of their rights, in the transportation of general commodities, with exceptions, from Houston to New Orleans, points within 10 miles of New Orleans, Baton Rouge, and the other six points enumerated in the Sub-2 authority under England's rights. In the reverse direction, however, very limited through operations could be performed as England of Texas holds authority from Lake Charles to Houston in the transportation of cotton, cotton linters, wool and mohair only, and, except for these few commodities, through operations from New Orleans to Houston under a combination of their rights is not authorized.

In re MC-F-7030: On September 24, 1958, which was much prior to the time Callaway acquired the stock of England and at which time it was held by J. C. Hunter who himself had acquired it in 1954 for about $54,000, Strickland entered into a contract with Hunter to buy the same stock for $175,000. Approval for that purchase was withheld in *Strickland Transp. Co.—Control—England Transp. Co.*, 85 M. C. C. 549, decided July 26, 1960, the Commision finding that approval would have adversely affected the efficiency and economies of the operations of protesting carriers because a diversion of any of their northbound traffic from New Orleans would further "imbalance" their operations, and the scant benefits the public would have received from approval would not have offset the disadvantages likely to result from that approval.

No. MC-F-8415: After Callaway purchased the stock of vendors in July of 1961 it appeared that he may have

unlawfully acquired control of them when they were already operating in excess of 20 motor vehicles and on April 15, 1963, an investigation was instituted under Section 5(7) of the act in MC-F-8415 to determine whether such a violation occurred. In September of that year Callaway filed his application in MC-F-8563 seeking authority to acquire control of vendors in event it was required. By a decision and order of division 3 of December 23, 1964 in No. MC-F-8415, *Clarence L. Callaway—Investigation of Control—D. A. Beard Truck Lines Company and England Transportation Company* (embracing the finance application proceeding in MC-F-8563), the findings of the examiner that unlawful control had been effectuated under mitigating circumstances, and his order of approval for Callaway to acquire control of those carriers for the future were adopted effective January 18, 1965.

No operations have been conducted by vendors themselves since May 1, 1964. Operations were authorized to be resumed under their rights by the respective purchasers (under a part of those of England of Texas) when temporary lease authority was granted in the finance proceeding. The reason vendors ceased operations is that their labor contracts expired effective April 30, 1964, and their management believed it would have been impossible to operate profitably under the union scale if new labor contracts were signed. Vendors' rights lay dormant from May 1 to the end of October 1964 and some are still dormant.

Prior to such cessation vendors utilized 27 trucks, 20 tractors and 36 trailers in their operations; England maintained terminals at New Orleans, Baton Rouge, Shreveport, Monroe, Houma and Lafayette, and had a commission agent at Alexandria; and England of Texas had terminals at Houston and at Lake Charles. England had around 20 employees and England of Texas had around 15.

Unable to resume operations, Callaway caused the prop-

erties of vendors to be sold at public auction which was held in New Orleans on June 17, 1964. As Strickland and Copperstate became the successful bidders for the properties involved herein, separate agreements made subject to Commission prior approval were executed.

THE STRICKLAND APPLICATIONS.

Strickland is a Texas corporation with 10 shares of common capital stock outstanding owned 9 shares by L. R. Strickland one share by F. B. Strickland. It operates approximately 190 trucks, 420 tractors and 850 trailers, maintaining terminals at the principal points it serves as hereinafter detailed. It is authorized, pursuant to certificates issued in No. MC-59680 and various subnumbered proceedings thereunder, to operate in interstate or foreign commerce as a motor common carrier principally of general commodities over a network of regular routes between points embraced within 17 States including Connecticut, Massachusetts, New York, New Jersey, Pennsylvania, Ohio, Indiana, Michigan, Illinois, Wisconsin, Missouri, Oklahoma, Arkansas, Tennessee, Texas and Louisiana. Its routes extend from Boston, Mass., via such principal points as New York City, Philadelphia, Pa., Cleveland, Akron, and Toledo, Ohio, Detroit, Mich., South Bend, Ind., Chicago, Ill., Milwaukee, Wis., St. Louis (also serving Kansas City), Mo., Memphis, Tenn., Little Rock and Texarkana, Ark., Amarillo and Wichita Falls, Fort Worth, Dallas, Waco, Austin, San Antonio, Houston and Beaumont, Tex., and to Shreveport, Lake Charles, Baton Rouge and New Orleans, La. It is not authorized to operate over direct routes between New Orleans and such points as Shreveport, Dallas, Texarkana, Little Rock, Memphis and points north thereof but is required to utilize a circuitous route of 644 miles via Houston when serving as far as Texarkana, which is 255 miles more distant than a direct route from New Orleans to

Texarkana via Shreveport (389 miles). It does, however, operate between Dallas and New Orleans over a deviation route which is just 76 miles more distant than a route via Shreveport.

Strickland also holds general commodity regular-route rights between Little Rock, on the one hand, and, Greenville, Miss., and Monroe and West Monroe, La., on the other, but these rights are now under lease to Burks Motor Freight Lines, Inc., of Little Rock. The lease was originally approved in No. MC-FC-31502 on March 18, 1948, for a period to expire March 18, 1958, and was renewed for an additional 10 years under authority granted in *Burks M. Freight Line, Inc.—Lease—Strickland Transp. Co.*, 75 M. C. C. 153 (decided March 5, 1958), which lease will now expire March 18, 1968, less than 2½ years hence. As stated by Strickland on brief, assuming approval herein, when the operating rights under lease to Burks revert to Strickland they would provide Strickland a shorter route for service between New Orleans and points north and east of Little Rock via the Monroe gateway. Protestants contend, however, that such a joinder of England's irregular routes into Monroe with Strickland's regular routes extending north from Monroe would result in an objectionable hooking up of irregular and regular routes condemned in other proceedings. This issue will be treated later herein.

Being required to operate over such circuitous routes in serving between New Orleans and the above-mentioned points, Strickland has tried for a number of years to obtain direct authority to New Orleans or otherwise avoid the circuity. One such way was its unsuccessful attempt to purchase the stock of England when it was owned by J. C. Hunter.

Another such effort by Strickland was its arrangement beginning in August, 1960 with the Illinois Central Railroad under which in so-called plan III TOFC, or piggyback,

service Illinois Central transported its trailers between St. Louis and New Orleans in substituted service. Such an arrangement began in August, 1960 but was terminated in a short time following a complaint filed by Gordons. In disposing of that complaint in *Gordons Transports, Inc.* v. *Strickland Transp. Co.*, 318 I. C. C. 395 (1962), embracing several I & S proceedings involving rates and Fourth Section applications to establish routes to cover the proposed substituted service, the Commission found that the arrangement afforded Strickland an undue competitive advantage by reducing transit time between the points in question by 8 to 10 hours when using the TOFC service as opposed to all-highway operations (from Chicago to New Orleans for example) thus enabling Strickland to effect deliveries one day earlier and to perform service entirely different from that authorized by its certificate; and that such an arrangement constituted an unlawful, destructive competitive practice. The Commission's decision was upheld in *Strickland Transp. Co.* v. *United States*, 219 F. Supp. 618 (1963).

The next attempt Strickland made to avoid this circuity came about when England officials approached those of Strickland at Shreveport to obtain interchange traffic and from this in the late summer of 1961 the Strickland-England interchange arrangement was commenced. The first results of operations under this arrangement shown of record is that in 1963 Strickland and England interchanged 2,071 loaded trailers. In the 6-month period from November 1, 1963 to April, 1964, they interchanged 996 such trailers, after which vendor's operations ceased, but during which period they interchanged shipments weighing 26,213,756 pounds representing some 35,000 shipments.[8]

8. In the six months between November 1963 and April 1964, England transported 11,844,372 pounds of freight for Strickland in inbound service from Shreveport to New Orleans in the Strickland-England interchange service which accounted for between 15,500

THE STRICKLAND-ENGLAND TRANSACTION.

Under an agreement of June 17, 1964, between Strickland and England, the former would purchase for $495,000 those portions of the operating rights of England under No. MC-57946 (Sub-No. 2), covering authority to engage in the transportation of general commodities, over irregular routes, wholly within Louisiana, from New Orleans and Plaquemine to Kentwood, Amite and Clinton (which destinations lie north of U. S. Highway 190), and under No. MC-57946 (Sub-No. 3), between New Orleans and points within 10 miles of New Orleans, on the one hand, and, on the other, points in Louisiana north of a line beginning at the Mississippi-Louisiana State line and extending along U. S. Highway 190 to its junction with U. S. Highway 165 at Kinder, thence along U. S. Highway 165 to its junction with U. S. Highway 90 near Iowa, and thence along U. S. Highway 90 to the Louisiana-Texas State line, and this authority does not authorize service from New Orleans to Kentwood, Amite and Clinton. Of the purchase price $49,500 was deposited in escrow upon execution of the agreement. Upon consummation the amount in escrow would be released to England. The remainder of the purchase price

---

and 16,000 shipments. In the same period in outbound service from New Orleans to Shreveport England made 450 trips in this service accounting for 14,426,507 pounds of freight. Each such load contained an average of 32,059 pounds. Assuming the inbound loads averaged the same amount, England would have transported 370 loads to New Orleans and assuming the average number of shipments per load inbound (42) was the same outbound it would have transported 19,000 or more shipments from New Orleans to Shreveport. In all England would have transported over 26 million pounds of freight in 820 loads (fewer than the 996 trailers Strickland report), accounting for some 35,000 shipments. These assumptions do not treat tl and ltl shipments separately. The evidence on which this discussion is based, is taken from exhibits prepared in such a way that they reflected the total number of shipments and pounds inbound to New Orleans and the total trips and pounds outbound from New Orleans. Averages were then computed on these known amounts.

as reduced by monthly rentals paid under temporary authority would be paid as follows: An amount which added to the amount in escrow would equal 29 percent of the remainder of the purchase price unpaid and would be paid in cash upon consummation. The remainder unpaid thereafter would be evidenced by five promissory notes of equal amounts bearing interest at the rate of six percent per annum on the unpaid balance and would be paid in five successive years beginning with the anniversary date of the first to be paid. As of the time Strickland prepared its brief (on November 12, 1965) 14 lease payments totaling $103,950 had been made making the adjusted consideration $391,050. Assuming consummation as of November 12, 1965, $113,404.50 (29 percent of $391,050) would have been paid by applying the $49,500 in escrow and paying $63,904.50 more in cash. The balance of $277,645.50 then remaining would be evidenced by five notes of $55,529.10 each. Total interest on the foregoing basis would have amounted to approximately $50,000.

FINANCIAL INFORMATION.

A balance sheet for England as of June 9, 1964 shows assets aggregating $182,613, consisting of: Current assets $51,572, composed chiefly of cash $741, receivables from affiliated company $25,501, accounts receivable $13,391 and prepayments $8,474; carrier-operating property, less depreciation, $120,750; investment securities and advances $100; and deferred debits $10,190. The liabilities were: Current liabilities $47,305, comprised of notes payable $9,000 and accounts payable $38,305; equipment obligations-due within one year $65,806 and due after one year $67,713; common capital stock $50,000 and surplus-unearned $12,351 and earned (deficit) $60,562. Its income statements for 1962, 1963 and the period in 1964 ending June 9 show operating revenues of $379,904, $764,904 and $318,360, deficit

of $44,216, net income of $31,034 and deficit of $38,360, respectively.

A balance sheet for England of Texas as of May 31, 1964 shows total assets of $8,888, including current assets of $7,483 of which $5,602 was cash. Liabilities consisted of current liabilities of $30,043, common capital stock $30,000 and earned surplus deficit of $51,155. Its income statements for 1962, 1963 and the period in 1964 ending June 9 show operating revenues of $47,611, $53,362 and $28,107, and deficits of $7,007 and $8,347, and net income of $3,038, respectively.

A balance sheet for Strickland as of February 28, 1965, shows assets aggregating $12,063,267, consisting of: Current assets $4,501,508 composed of cash, working funds and special deposits $567,882, accounts receivable from affiliated companies $1,262,482, accounts receivable, less reserve for uncollectible accounts, $1,930,466, prepayments $589,247, and materials and supplies $151,430; tangible property, less depreciation, $6,107,527; intangible property $460,689; notes receivable—advanced to affiliated company $500,000; investment securities and advances $116,269; and deferred debits $377,274. Liabilities were: Current liabilities $3,552,709 comprised chiefly of accounts payable $1,680,160, wages payable and vacation wages and holiday pay accrued $826,486, taxes accrued $815,506, and reserves $210,811; long-term debt-due within one year $1,831,670 and due after one year $2,654,548; deferred credits $55,381; common capital stock $1,000; and surplus-unearned $1,362,748 and earned $2,605,211. An income statement for Strickland for 1963 which was prior to the merger into it of Strickland Motor Freight Lines, Inc., a Connecticut corporation[9] shows operating revenues of

9. By order of Finance Board No. 1 entered September 14, 1964 in No. MC-F-8818, Strickland Transportation Co. Inc.—Merger—Strickland Motor Freight Lines, Inc. (a Connecticut Corp.), the merger of the Connecticut corporation into Strickland was authorized. The actual merger was effectuated on December 31, 1964.

$15,051,356 and net income of $138,943 before, and $136,599 after, provision for income taxes. Income statements of the merged companies for 1964 and the first two months of 1965, show operating revenues of $28,487,166 and $4,834,628, and net income before provision for income taxes of $1,224,653 and $108,630, and net income after such provision of $621,741 and $60,501, respectively.

England estimates that 60 percent of its revenues were derived from traffic transported under the rights Strickland seeks to acquire including that moving in the so-called Strickland-England truckload interchange service.[10] In 1963, England's total revenues of $764,904 included $319,565[11] derived from transporting 2,071 trailers for Strickland in their interchange service so that $139,378 (the remainder of the 60 percent) was derived from England's over-the-road operations in that year under those rights. Strickland estimates that its own costs for moving the 2,071 trailers the 313-mile one-way distance between Shreveport and New Orleans would have been $103,117 less than the amount it paid England[12] and its expense to produce the remainder of England's 1963 revenues would have been just $107,240 giving it a net income before provision for income taxes of $135,255 and $64,922 after such provision had it conducted the operations England conducted in 1963. At this rate it would recoup its investment in the acquisition of the rights in approximately seven years.

---

10. A service in which Strickland leased trailers to, or exchanged trailers with, England. Trailers Strickland turned to England were loaded and sealed, England transporting them from Shreveport to New Orleans, or in the reverse direction receiving a flat fee for so doing. This service will be more fully treated elsewhere herein.

11. This amount is less than the product of 2,071 times $160 per trailer as Strickland was paying at the rate of $125 per trailer the first part of 1963.

12. 313 miles times 2,071 trailers times the cost of 33.39 cents per truck mile equals $216,448 for Strickland's cost to move these trailers.

Legality of the Strickland-England Interchange Arrangement: The object of the Strickland-England interchange arrangement was for Strickland to avoid circuity in serving between its authorized points north of Shreveport and New Orleans and for England to obtain traffic to transport between Shreveport and New Orleans. Further details of the arrangement are that England supplied tractors and drivers and, while the record is not entirely clear on the point, England appears to have exchanged one of its own empty trailers for each loaded trailer it obtained from Strickland and whether a Strickland or England trailer was pulled the charge was the same. England did cut a freight bill for each trailerload transported charging Strickland $160 and collecting no other amount as its share of the revenues collected by Strickland. England performed no pickups or deliveries of such freight as a part of the $160 charge, and, as will be discussed later, charged separately when handling such freight in its vehicles beyond New Orleans. This traffic was billed by Strickland as its own freight in the same way as it bills traffic that moves between any other of its on-line points.

Because of the manner in which Strickland and England performed their interchange and provided for a division of the revenues earned by this traffic, protestants on brief argue that they were engaged in the unlawful pooling of their traffic, services and revenues in violation of section 5(1). They reason at the outset, however, that the arrangement is essentially the same as the one between Strickland and Illinois Central which was condemned in the *Gordons complaint case, supra,* that the only difference being a motor carrier performed the substituted service instead of the railroad. The *Gordons complaint case* did not find (nor was it contended) that Strickland and Illinois Central were engaged in pooling or the division of traffic.

The thrust of protestants' argument that Strickland and England engaged in pooling or a division of traffic is that because Strickland held authority to perform service between Shreveport and New Orleans, that when Strickland elected to have England transport its freight by pulling its trailers, loaded or unloaded, for a fixed price per trailer, regardless of the weight, type or value of the freight being transported, both carriers were engaged in unlawful pooling. They rely on the decision in *Pooling of Merchandise Traffic, St. Louis, Mo., to Los Angeles,* 276 I. C. C. 424 (1949), and *Pooling L. C. L. Freight Service, New York and Philadelphia, to Macon,* 283 I. C. C. 158 (1951). These cases are not entirely distinguished although in them two carriers performing parallel and competitive services alternately received the pooled traffic, whereas here while there could have been alternating, it appears that Strickland always gave the traffic to England.

Next protestants rely on the reasoning in one of the household goods pooling cases[13] which they say hold that an arrangement whereby a carrier could have traffic transported either by a competing carrier or transport it itself constituted pooling between two competing carriers within the meaning of section 5(1). The principle found in *Geitz*[14] is that the arrangements were in fact "broad arrangements relating to competitive traffic between competitive carriers, by which the facilities of all are made available through the medium of United [a nationwide carrier] to all traffic booked with it, and contemplates the divisions of resulting revenues between United and its carrier-agents not on the basis of individual performance, but on percentage bases which are identical for all." That case also found that when a carrier-agent of United elected between itself transporting or surrendering to United

13. *Geitz Storage and Moving Co. Inc., Investigation of Control,* 55 M. C. C. 649, and also 65 M. C. C. 257.

14. 65 M. C. C. 257 at pages 291 and 292.

traffic tendered to it which both it and United were authorized to transport from origin to destination, the result was a division of traffic between two competing carriers.

Lastly, however, protestants urge that the challenged arrangement should be found to be a division of traffic and pooling under the reasoning applied by the examiner in his report in No. 33872, *Switchmen's Union of North America* v. *Southern Pacific.*[15] The examiner there found that Southern Pacific and its then wholly owned subsidiary Pacific Electric Company, another aril carrier, were engaged in the unlawful poofing or division of traffic when the former exercised the option (under an agreement with Pacific Electric and under provisions of appropriate tariffs) to route loaded or empty cars over Pacific Electric lines which were essentially parallel to its own lines within the Los Angeles area, or to move them over its own lines, the movement in question being between points between which both were authorized to serve and did serve in their separate operations. Under the reasoning in the examiner's report amply supported by the statute and the case law interpreting it,[16] any undertaking by carriers in consort to have the traffic of one transported by another between two points both of which they may both serve is an arrangement for pooling or the division of traffic within the purview of section 5(1) regardless of their contractual arrangements, the method of compensation for the services

15. The issue there became moot by reason of the authority granted in Finance Docket No. 23011, *Southern Pacific Co.—Merger—Pacific Electric Co.*, ... I. C. C. ....., decided September 23, 1964, embracing the *Switchmen's Complaint case*, and subsequently consummated.

16. A competitive relationship existed between the carriers. *Railroad Freight Traffic, Everett and Bellingham, Wash.*, 298 I. C. C. 520 (1956). The arrangement imposed a limitation upon solicitation rights of the carriers. *Bostom & M. R. Pooling Application*, 298 I. C. C. 703 (1956). The traffic could be pooled irrespective of shippers' routings. *Pooling, Less Than Carload Traffic, Nashville & Memphis*, 291 I. C. C. 79 (1953).

rendered, the provisions in tariffs covering such transportation, the manner in which any rate divisions are agreed to or revenues divided, or the reservation to shippers to obviate the pooling, and to activate the statute only requires that *the carriers are able to compete for the same traffic.* No showing is required that the arrangement does in fact restrain competition but merely that the carriers engaged in such pooling are authorized to perform competitive services. Both carriers must operate between the points which the pooled traffic moves.[17] If this be true, all plan I piggyback arrangements amount to pooling or the division of traffic; as well as the arrangement between long-line and short-line motor carriers where traffic of the former is turned to the latter for expeditious delivery to outlying points the long-line carrier is also authorized to serve; as well as the joint motor-rail service performed by rail carriers and their motor-carrier affiliates. In short, not even the simple interchange of traffic between any two carriers both of which are authorized to serve the points at which the traffic is interchanged and the point at which it is terminated by the interchange carrier may be performed unless the arrangement between the carriers is approved as one for the pooling or division of traffic and their services under the provisions of section 5(1).

These arguments attacking the validity of the Strickland-England interchange arrangements as unlawful pooling are made by 10 attorneys representing 13 responsible motor common carriers many of whom undoubtedly similarly (albeit unwittingly) participate in essentially similar arrangements and thus the pooling of traffic, revenues and services to some extent when conducting their own operations. It

17. This is not true of the factual situation in pending Finance Docket No. 23403, *Southern Pacific Company Abandonment Between Bremond and Waco, Tex.*, in which a pooling of services is proposed between Southern Pacific and the Cotton Belt to enable the former to bridge a proposed gap in its lines if the proposed abandonment is approved.

would be virtually impossible for them to conduct an efficient and economical motor carrier service without being able to surrender to local carriers shipments moving in line-haul service to points around their terminal points which they are also authorized to serve.[18] Whether the protesting carrier is a long-line carrier or a local or distribution carrier, the practice is economical for the one and beneficial to the other. In fact, many distribution carriers depend heavily upon such traffic.

It is not believed, however, that this proceeding is the proper one to adjudicate whether the Strickland-England interchange practices amount to an arrangement within the purview of section 5(1) and were acts of illegality tainting Strickland's future fitness, or England's lawful user of its rights between Shreveport and New Orleans. The arrangement existed for perhaps 2½ years during which there was no formal challenge by the Commission or these competing carriers to the legality of the arrangement and during which time thousands of shipments were transported accounting for millions of pounds of freight. The interchange practices were conducted openly in the apparent belief they were lawful and they neither impinge upon the fitness of Strickland nor cast the curse of dormancy upon England's rights between those points.

Protestants' requested findings to the effect that the rights of England were dormant between Shreveport and New Orleans during the period England was transporting traffic by leasing Strickland's trailers between those points are rejected. Rights that are operated cannot be said to be dormant. When utilized for an unlawful purpose the unlawful operations could be disregarded when examining

18. While the traffic divided between Strickland and England moved in equipment owned by the former, and that divided between long-line and short-line carriers moves in equipment owned by the latter, the essential ingredient of electing to surrender competitive traffic is always present.

the extent of user of the rights, but here the user was novel in motor-carrier operations and not now subject to a finding that they were illegal.

Protestants also argue that because all of vendors' rights were dormant during the five months between May and October of 1964 that those not authorized to be resumed and resumed under temporary authority remain dormant.

Prior to their interruption by reason of labor difficulties, operations were being conducted under some of vendors' rights. The temporary interruption does not activate the requirement that proof of public need must be shown to authorized their acquisition and resumption of operations under them. Operations which vendors conducted prior to their temporary cessation which vendees were authorized to resume and did resume under temporary authority are the operations which will support a finding of user. Whether vendees have sustained the burden of proving a public need for resumption to full vigor of operations under the portions of vendors' rights which were dormant prior to their temporary total cessation will be considered at the appropriate place herein.

Over-the-Road Operations of England: England utilized 5 sleeper-cab tractors in the Strickland-England interchange service, and separately operated over 20 tractors with a few less trailers in its own over-the-road line-haul operations. Additionally it maintained a fleet of between 20 and 30 pickup trucks. Its own line-haul operations as well as distribution operations were in turn keyed to the service performed in conjunction with Strickland. Clearly it was intended that all freight coming to New Orleans in the Strickland-England interchange arrangement that was destined to points in Louisiana outside of New Orleans commercial zone was to be turned back to England for delivery for which England prepared its

own freight bills and collected its division of the applicable revenues. The evidence shows numerous instances of individually identified shipments which were moved by England both in the interchange arrangement with Strickland to New Orleans and in a beyond movement by England to destination. There were also instances showing that traffic which England originated as far north as Monroe was brought to New Orleans by England interchanged with Strickland and thereafter moved by England in the interchange service to Shreveport for movement beyond by Strickland. It was readily admitted by applicants—and so stipulated—that much of the traffic England delivered to points in Louisiana south of U. S. Highway 190 was traffic it moved from Shreveport in the Strickland-England interchange service to New Orleans and thence in over-the-road service from New Orleans to destination. In short, England's operations were conducted as though it held authority between Shreveport and other points in Louisiana with New Orleans serving as a gateway for the service it rendered.

The Legality of England Radial Operations: As previously shown, England was authorized to utilize New Orleans as a gateway on traffic moving betwen points in Louisiana, on the one hand, and, on the other, Baton Rouge, Plaquemine, Thibodaux, Ponchatoula and Hammond—points which are on or south of U. S. Highway 190—as well as Kentwood, Amite and Clinton—points which are north of U. S. Highway 190—by utilizing its authority under MC-57946 (Sub-No. 2) in combination with its authority in MC-57946 (Sub-No. 3). However, and apparently to fortify itself with an interpretation of its authority, former officials of England addressed a letter to the Commission's field office at New Orleans under date

of August 22, 1961 and received a reply dated September 2, 1961 interpreting England's authority. That letter reads:

> This is in response to your letter of August 22, 1961, in which you make reference to your operating authority granted in MC-57946 Subs 2 and 3 and request advice as to whether you are authorized to engage in transportation of goods through New Orleans destined to various points in Louisiana.
>
> In my opinion, it is possible for you to engage in the interstate transportation of goods destined to points in Louisiana or originating at points in Louisiana, but moving through New Orleans and that this may be accomplished by combining the authority contained in your certificate MC-57946, Sub 2, with that in your Sub 3 certificate.

The key to the reply is the expression "by combining" the authority in Sub 2 with that in the Sub 3. However, the reply was obviously misinterpreted by officials of England who construed it to mean that England possessed authority to move shipments between two points in Louisiana other than New Orleans merely by conducting physical operations via that point under the authority in MC-57946 Sub 3 alone.

Earlier than this, however, a letter dated August 2, 1961, was addressed to the Secretary of the Commission by an attorney on behalf of Saia who inquired whether England was authorized to transport interstate traffic from Lake Charles to New Orleans and thence to Baton Rouge. The reply of August 10, 1961, set forth as Appendix C-1 hereof, confirms that the suggested movement was lawful.

Later still the same attorney in a letter dated January 23, 1963, addressed to the Director of the Bureau of Motor Carriers, again on behalf of Saia, inquired whether England was authorized to receive interchange freight

at Lake Charles, take it to New Orleans and thence back to Houma and Lafayette "for distribution to surrounding areas." The February 1 response to this letter, set forth as Appendix C-2 hereof, is that the transportation of such a shipment from Lake Charles to New Orleans and back to Houma or Lafayette would be a prohibited cross-haul, and that England may not transport such a shipment from Lake Charles to Houma or Lafayette.

An even later letter from the same attorney still on behalf of Saia and addressed to the Bureau of Motor Carriers on March 16, 1964, inquired whether England was authorized to pick up interchange traffic at Shreveport, transport it to New Orleans and thence to Baton Rouge, Houma, Lafayette, New Iberia, Lake Charles and Opelousas; and to pick up traffic at such points as Lafayette, Franklin and Baton Rouge, transport it to New Orleans and thence back to Lake Charles or Shreveport for interchange. The answer to this letter is dated April 7, 1964, a short time before England ceased all operations, is set forth as Appendix C-3 hereof, and states in essence that of the examples given the only movement lawfully possible is that from Shreveport to Baton Rouge via New Orleans.

The letter from the Bureau of Motor Carriers' field representative to England dated September 2, 1961, was read into this record. The letters exchanged between the attorney for Saia and officials of the Bureau of Motor Carriers (originals of incoming letters and copies of their replies) are filed in the correspondence sections of Docket Nos. MC-57946 Sub 2 or Sub 3. Under the provisions of section 7(d) of the Administrative Procedure Act, official notice is taken of the several letters and their replies mentioned. Such notice is taken for the purpose of showing that while in each reply the authorities held by England were consistently interpreted, there has been no showing that officials of England had actual or even

constructive knowledge of the contents of the letters and the replies exchanged between counsel for Saia and the Bureau of Motor Carriers. The interpretation which Callaway appears to have replied upon is the one of the Commission's field representative of September 5, 1961, which, of course, Callaway misinterpreted.

Without finding for the moment that the illegality of the numerous cross-hauls England performed would impair a finding of lawful past user of its rights, evidence of the nature and volume of its over-the-road operations will be considered after some preliminary observations.

In order to show the service England performed prior to May 1, 1964 under the rights Strickland would acquire, applicants furnished with the application a 12-day study of England's operations and furnished at the hearing a 6-month study. The 12-day study includes shipments moving in the Strickland-England interchange arrangement which are also included in the 6-month study furnished at the hearing. For this reason counsel for Strickland and England agreed to eliminate from the record the duplicate shipments furnished with the application which moved in the Strickland-England interchange service. Those furnished in the application which show over-the-road operations on the 12 days are not duplicated by those furnished at the hearing and while the offer of counsel perhaps could be construed to include the elimination of shipments of the 12-day study, there was extensive cross-examination relating to individual shipments included in that study and to exclude consideration of all of them would defeat the purpose of showing the nature and extent of England's past over-the-road operations. They therefore will be considered as showing the nature and extent of its service.

Other Over-the-Road Operations by England: The evidence also shows, however, that England conducted lawful operations receiving and giving up traffic at New Orleans

which it delivered to points in Louisiana or which would move beyond Louisiana but not by Strickland. It had an established service between New Orleans and such points north of U. S. Highway 90 as Alexandria, Shreveport, Monroe, West Monroe, Ruston, Sterlington a few other points surrounding these points. Until operations ceased, it had terminals at New Orleans, Shreveport and Monroe which served Bastrop, Ruston, West Monroe, and Sterlington. England operated daily between New Orleans and Shreveport and also between New Orleans and Monroe even though there is no showing that in its own over-the-road operations it originated any traffic at Shreveport. Between New Orleans and Monroe it operated at least one vehicle regularly loading it at New Orleans during the day and running overnight to Monroe, but more often had two units in this service dispatching one in each direction each night.

In performing operations separate from those keyed to the Strickland interchange service, England interchanged traffic at New Orleans with freight forwarders including Republic, Midland and National, and such motor carriers as West Bros., Viking, Central, Ozone, Cooper and Johnson and also Seatrain, a water carrier. Its interchange with Seatrain was almost entirely in the transportation of carbon black from Tate Cove or Sterlington in truckload quantities. Some traffic England originated at points north of U. S. Highway 190 moved to points in Mississippi, Alabama, Florida and Georgia, states which Strickland does not reach and clearly not a part of the Strickland-England interchange service.

While Strickland contends on brief that England served as many as 126 points in Louisiana, the evidence does not support its contention. As shown in Appendixes D and E, in operations separate from those performed in conjunction with Strickland, in a 6-month period just prior to cessation of its operations in May of 1964, England trans-

ported slightly more than 2,100 shipments involving points north of U. S. Highway 190 but of these there were about 100 which showed no out-of-state origin or destination and are presumed to be intrastate in nature so it can be credited with transporting in over-the-road service 2,006 shipments which weighed 6,283,515 pounds. A significant volume of its outbound tonnage consisted of the truckloads of carbon black from Sterlington and Tate Cove to New Orleans for interchange with Seatrain. While it handled other truckload shipments, a majority were less-than-truckload in nature moving inbound principally to Alexandria, Monroe and Shreveport with a lesser number to Bastrop and Ruston. Protestants were able to show that in many instances[19] England surrendered shipments short of their destinations in Louisiana and in these instances it has been credited with serving the point at which the surrender was made, such as Shreveport, Alexandria, or Monroe, but it will be seen from the appendixes that it nevertheless did serve 12 or so lesser points in isolated instances.

England's own service on traffic originating at Louisiana points north of U. S. Highway 190 is somewhat less impressive, although in addition to the carbon black shipments it had other truckload shipments from Monroe and Bastrop as well as less-than-truckload shipments from those points and Alexandria, but it appears to have been wholly unsuccessful itself in originating any traffic at Shreveport or Ruston. While the breakdown in Appendixes D and E show the relationship between England traffic having out-of-state origins or destinations north of northeast of Louisiana, and show that over 62 percent (901) of the 1,449 inbound shipments had out-of-state origins north or northeast of Louisiana, all were received from carriers other than Strickland or from freight forwarders. Only 63 in

19. It was shown that England gave the former Worthy Motor Lines 453 shipments in a 16-month period in 1963 and 1964 and gave the former Huff Truck Line 70 shipments in that period.

number (excluding carbon black shipments) England itself originated had out-of-state destinations north or northeast of Louisiana and if interchanged with Strickland at New Orleans and rehandled to Shreveport in the Strickland-England interchange service, would be a small fraction of the total tonnages England handled for itself and for Strickland. In view of the erroneous interpretation given to its operating authority, the volume of traffic originated by England north of U. S. Highway 190 which could have moved in England's over-the-road service to New Orleans and thence in the Strickland-England interchange service to Shreveport is small and insignificant. While there may have been a more significant number of inbound shipments moving in the Strickland-England interchange service also handled by England from New Orleans to Louisiana destination, no study is of record to support a finding as to the extent of such significance. And again, the second movement of the same shipment under the same authority was by reason of Callaway's misinterpretation of the Sub-3 authority.

Strickland's Operations To and From New Orleans: When England ceased operations Strickland nevertheless continued to handle traffic moving between Dallas, Texarkana and points beyond, on the one hand, and New Orleans on the other. In the six months prior to its exercising temporary authority herein Strickland handled a total of 47,052 shipments from and to New Orleans of which 11,305 moved out of that point and 35,747 into it. They weighed a total of 52 million pounds with outbound shipments amounting to 23.8 million pounds and inbound 28.2 million pounds. These shipments moved between New Orleans, on the one hand, and, on the other, Dallas, Little Rock, Texarkana, Memphis and points north and east thereof. While those moving between Texarkana and beyond on the one hand, and New Orleans on the other,

were moved over the 644-mile circuitous route or interchanged with competitors, the record does not show the proportion of those interchanged and those moved circuitously. The Dallas-New Orleans shipments in this period are not shown separately.

Under temporary authority Strickland resumed operations similar to England's own over-the-road operations but these were on a much smaller scale. Strickland continues to serve Monroe and its surrounding area as well as Shreveport on a call and demand basis but has no terminal at Monroe. It handled just 11 interstate shipments in January and February of 1965 moving from points north of U. S. Highway 190 to New Orleans weighing 288,759 pounds. They included 2 from Sterlington (68,266 pounds), 3 from West Monroe (88,632 pounds), 2 from Bastrop (71,938 pounds), and 2 each from Shreveport and Bossier City (59,825 pounds total). Strickland has not afforded the same competition to local carriers as afforded by England on traffic moving between New Orleans and points north of U. S. Highway 190 as it is already competitive with those bringing traffic into New Orleans from Texas, Arkansas and points north thereof, and does not otherwise serve as a distribution carrier in Louisiana.

Immediately upon exercising temporary authority Strickland also itself resumed essentially the same operation England had provided for it between Shreveport and New Orleans and eliminated the prior circuity both from Texarkana and north as well as from Dallas. It was able to increase the volume moving to and from New Orleans as in the first six months after temporary authority was exercised it transported 52,173 shipments in and out of that point of which 10,222 moved outbound and 41,951 moved inbound. The outbound volume for this period was

24 million pounds and the inbound volume was 33.5 million pounds.

A study of shipments, their weights and revenues moving to and from New Orleans in five of the six months following approval of temporary authority shows that Strickland transported 33,782 shipments weighing 26.9 million pounds into New Orleans which produced revenues of $786,230; and transported just 8,470 shipments weighing 18.9 million pounds out of that point which accounted for revenues of $296,440. These shipments moved from and to Dallas, Texarkana, Little Rock, Memphis, St. Louis and points north and northeast thereof. Dallas accounted for 8,287 (24.5 percent) of the inbound shipments weighing 7 million pounds moving to New Orleans and 3,335 (39.37 percent) of the outbound shipments weighing 5.1 million pounds moving to Dallas, with Texarkana, Little Rock and Memphis together accounting for only 220 of the inbound and 672 of the outbound shipments. This means that 25,275 inbound and 4,463 outbound shipments had origins or destinations at St. Louis or beyond and is indicative of the future service Strickland could be expected to provide and a clear indication that it would handle a great deal of extremely long-haul traffic to and from New Orleans.

Seven shippers who prepay their freight charges and control the routing of their traffic support the Strickland application. Two are located in Louisiana, 1 in Boston, Mass., 1 in Norwalk, Conn., and 3 in northern New Jersey —Newark, Elizabeth and Morris Plains.

The Louisiana shippers—one shipping industrial and agricultural chemicals from Sterlington and the other paper products from West Monroe—have utilized England to New Orleans in the past on truckload traffic moving to Florida and southern portions of Mississippi, Alabama and Georgia; and would use Strickland's service under the

acquired rights, but admittedly also have available the services of some protestants such as Red Ball, Braswell, Ryder and Herrin from West Monroe, and Red Ball and Braswell from Sterlington. The West Monroe paper plant gave England approximately 90,000 pounds of its freight a month in the first four months of 1964 and a like amount to Strickland in the same period in 1965. The chemical plant gave Strickland 80,000 pounds of its freight in three truckloads in January and February of 1965.

The five shippers from the Northeast ship such commodities as shoes (from Boston), electrical connectors (from Norwalk), paints, varnishes, lacquer and industrial coatings (from Newark), pharmaceuticals (from Morris Plains), and structural steel including safety tracks and aluminum footwalks (from Elizabeth) to New Orleans and its surrounding areas; all are using the services of Strickland; all would continue to utilize its services; all control the routing of their traffic and generally prepay the freight; and most expressed a need for expedited service at times depending upon their individual problems. For example, the shoe retailer handles seasonal items requiring timed deliveries; the drug company needs expedited handling of drugs to accommodate consignees maintaining small inventories and in event of epidemics; the paint manufacturer needs to coordinate deliveries with sales promotion; and the metal manufacturer works under contracts with penalty clauses and is required otherwise to meet construction schedules.

Considering all of the traffic Strickland handled to and from New Orleans in the five months following temporary authority in one year's time it could handle as many as 100,000 shipments weighing over 110 million pounds from which it could be expected to produce revenues of $2.6 million.

A more detailed study of Strickland traffic handled to

and from New Orleans on one day of each of five months following approval of the temporary lease shows that very little moved beyond the New Orleans 10-mile radius or involved interchange by Strickland with other carriers and there is no evidence to show that Strickland handled any of this traffic from or to an interior Louisiana point (north of U. S. Highway 190) by utilizing England's radial rights twice on the same shipment as England had done in the past.

Turning then to a consideration of the operations Strickland could be expected to conduct under the acquired rights aside from the regular-route operations between Shreveport and New Orleans, a finding is warranted that it would not unify its existing rights with those to be acquired at New Orleans to enable it to serve all points north of U. S. Highway 190 on traffic moving between points north and northeast of Texarkana and those interior Louisiana points. To do so would require it to operate over the circuitous route via Houston and worse yet, if it were to move the traffic to New Orleans via Houston would require it to perform still more circuitous operations to the inland points above U. S. Highway 190. Strickland could be expected for the future to interchange all Dallas and north of Texarkana traffic destined for these interior Louisiana points either at Shreveport or at New Orleans. Interchange at Shreveport would not involve using any acquired England rights. Movements over the regular route sought in Sub 142 from Shreveport to New Orleans would, in the sense Strickland is willing to have the rights obtained restricted, amount to using up the authority as to any shipment moved from Shreveport to New Orleans. It could not thereafter lawfully move that shipment to another Louisiana inland point north of U. S. Highway 190 under the acquired rights if they were to remain intact. It is true that interstate shipments Strickland may hereafter originate at Shreveport or

other inland Louisiana points under the acquired rights could be brought to New Orleans for movement over its existing regular route into southern Texas, or interchanged with other carriers (including Copperstate—an interchange protestants say would preserve a duplicate use of the rights of England). However, Strickland would have virtually no use for England's irregular-route authority if it is re-described in terms of regular route authority between New Orleans and Shreveport and Monroe and used in conjunction with its regular-route operations between New Orleans, on the one hand, and Dallas, Texarkana and northern points, on the other.

Protests Against the Strickland Applications; Arkansas-Best: Arkansas-Best, including the now merged Delta Motor Lines, operates over regular routes which extend from New Orleans to Chicago and Milwaukee on the north, Cleveland on the east, Wichita, Kans., on the west and Houston and San Antonio on the south, but while it has no connecting routes between New Orleans and Shreveport and other Texas points, it does serve many of the same points served by Strickland to and from New Orleans such as Memphis, Little Rock, other central Arkansas points, St. Louis, Chicago, Milwaukee, Toledo and Cleveland. It serves Shreveport through Texarkana over the same routes as Strickland between the latter points, but has no authority to serve interior Louisiana points as authorized under England's rights Strickland seeks to purchase. It operates more than 220 trucks, 580 tractors and 1,200 trailers, and maintains terminals at all of the points mentioned.

Arkansas-Best performs daily operations to and from New Orleans with scheduled service over the most direct route overnight between New Orleans and Memphis (398 miles), second-morning service between New Orleans and St. Louis and Chicago (977 miles), and third-morning service to Toledo and Cleveland.

Arkansas-Best averages 645,000 pounds of freight daily in and out of New Orleans which accounts for an average of $10,300 in revenue. On this basis its annual volume would exceed 165 million pounds and revenues would be more than $2.6 million. It would have as many as 76,500 shipments moving in and out of New Orleans with 73 percent of these inbound and a majority from points competitive with Strickland. Arkansas-Best would move some 8,800 shipments a year to New Orleans from Memphis which would account for 37 million pounds of freight and it would move about 2,400 shipments a year outbound to Memphis which would account for perhaps 20 million pounds. Strickland in the past has handled no shipments to speak of between Memphis and New Orleans.

In the first quarter of 1964, Arkansas-Best had net income of $111,000 from revenues of $5.2 million when its operating ratio was 94.6, but in the first quarter of 1965 had net income of $72,000 from revenues of $4.9 million and its operating ratio increased to 96.5. It argues that it had a substantial decline in gross revenues and net income "during the past year" but cites no annual figures to support this allegation. Those of record show that it had a 35 percent decline in net income from a 5 percent decline in gross revenues in its first quarter of 1965 compared with the first quarter of 1964.

Arkansas-Best opposes the applications contending that Strickland would become another carrier operating over direct routes between New Orleans and points north of Louisiana now served by Arkansas-Best. It has not regarded Strickland as a competitor on New Orleans traffic to and from the North even though it is aware that Strickland possesses such authority and does compete with it, but believes that Strickland's competitive position would be enhanced by its acquisition of the England rights.

Arkansas-Best argues, for example, that whereas its own

operations between New Orleans and Memphis, St. Louis and Chicago are performed over direct routes, if Strickland were to obtain England's rights, its routes would be shortened by 266 miles from all three points when operating via Shreveport and by 351 miles from St. Louis and Chicago to New Orleans when operating via Monroe, and by 383 miles from Memphis to New Orleans when operating via Monroe. Arkansas-Best's routes from Memphis to New Orleans measure just 398 miles, 161 miles less than via Shreveport. Strickland would incur costs of $93 per trip more when operating from Memphis to New Orleans via Shreveport and $54 more when operating from Memphis to New Orleans via Monroe than if it were able to operate the 398-mile direct route held by Arkansas-Best. Its present additional cost from Memphis to New Orleans via Houston is just $89 above the cost via Shreveport. Strickland's route from New Orleans via Houston is 544 miles farther than Arkansas-Best's direct 398-mile route. The England rights would shorten Strickland's Memphis-New Orleans route by 266 miles but its route would still be 278 miles farther than Arkansas-Best's. It now costs Strickland $88.82 per trip more when operating from New Orleans via Houston to points north of Texarkana than via Shreveport and would cost it $92.82 more to operate from Memphis to New Orleans via Texarkana and Shreveport and $53.76 more via Monroe than if it were able to operate over the same route as Arkansas-Best from and to those points. These additional costs alone should deter Strickland from becoming so competitive to Arkansas-Best between Memphis and New Orleans as to seriously affect it, but moreover, a condition will be imposed prohibiting Strickland from utilizing the acquired rights to handle traffic between Memphis and New Orleans which would protect Arkansas-Best and others in this respect.

Campbell Sixty-Six: Campbell Sixty-Six protests ap-

proval of the Strickland applications on somewhat the same grounds as Arkansas-Best. Like the latter Campbell Sixty-Six operates over regular routes between New Orleans on the south and numerous points in Mississippi, Arkansas, Missouri, Eastern Oklahoma and Kansas via St. Louis into Chicago on the north, and utilizes direct routes between New Orleans, Memphis, St. Louis and Chicago. It has approximately 35 terminals with a pool of equipment stationed at New Orleans. Its fleet consists of 215 trucks, 379 tractors and 625 trailers. It schedules overnight service from New Orleans to Memphis and second-morning service to St. Louis and Chicago. Its operations to and from New Orleans are a sizable part of its total operations. Based on a study of shipments and tonnage into and out of New Orleans on five selected days in March of 1965, it would handle as many as 93,000 shipments a year to and from that point which would account for perhaps 117 million pounds of its freight. As much as 38 percent of the New Orleans shipments and 40 percent of the tonnage would involve operations to and from Memphis, Little Rock and other midwestern points, and the rest other points in Arkansas, Missouri and Illinois. In 1963 Campbell Sixty-Six produced gross revenues of $19.4 million and had net income of $781,000 when its operating ratio was 92.6. In 1964 on revenues of $21 million it had net income of $716,000 with an operating ratio of 93. While in the first quarter of that year its revenues exceeded $4.8 million and its net income was $98,000, in the same quarter of 1965 with revenues increasing to $5 million its net income dropped to $21,000 and its operating ratio increased to 99.1.

Most of the traffic Campbell Sixty-Six handles to and from New Orleans and all of that included in the 5-day study would be subject to the competition Strickland would afford to and from New Orleans, but what was said of Arkansas-Best applies equally to Campbell Sixty-Six. Ap-

proval of the Strickland proposals should not seriously affect Campbell Sixty-Six.

Gordons: Gordons performs its principal north-south long-haul operations over direct regular routes between New Orleans and Mobile, Ala., on the south and Chicago on the north via Hattiesburg and Jackson, Miss., Birmingham and Decatur, Ala., Memphis and St. Louis. It performs additional operations between Chicago on the north and Fort Worth and Dallas on the southwest via St. Louis and Fort Smith, Ark., and Atlanta, Ga., on the southeast via Nashville and Chattanooga, Tenn.; between Kansas City and Memphis; and between Fort Smith and Atlanta via Little Rock. In connection with these operations it conducts operations between New Orleans and Baton Rouge and other points in Louisiana serving Raceland, Donaldsville and New Roads and points which are on its regular routes east of the Mississippi River and on and north of Louisiana Highway 18 including such points as Amite, Clinton, Hammond, Kentwood, St. Francisville, Bogalusa and others. Its rights to serve some of these points were included in its merger of Huff Truck Line, Inc., which it controlled for a time and its purchase of Worthy Motor Lines, which was consummated April 5, 1965. Gordons serves these Louisiana points in peddle operations from New Orleans.

Gordons operates 161 trucks, 575 tractors and 1,047 trailers in revenue service. It has terminals at 16 points of which the 11 which are owned by it, or an affiliated company were built at a cost of around $4½ million.

In handling truckload traffic, Gordons' operations are scheduled to provide overnight service from New Orleans to Memphis and second-morning service to St. Louis and Chicago with similar service in the reverse direction. Its schedules are set up for second-day service on ltl freight between New Orleans and the northerly points.

The thrust of Gordons' presentation is that it has a smaller amount of traffic moving outbound from New Orleans than inbound to New Orleans, is required at times to dispatch empty equipment northbound and is fearful that approval of the Strickland applications will result in further depleting its northbound traffic. In this connection it contends that the volume of traffic moving out of New Orleans is steadily declining. In its first six 4-week accounting periods in 1964, Gordons moved 78.9 million pounds of freight outbound from New Orleans which produced gross revenues of $763,469 and of which 60 million pounds moved to St. Louis, Chicago and Memphis, Memphis accounting for 26 million pounds and representing revenues of $195,000. In the first six such accounting periods in 1965 its total outbound tonnage dropped 19 percent to 63.9 million pounds and revenues fell off 3.5 percent to $736,622; and the volume to Memphis dropped 10.7 percent while revenues from that traffic dropped 7 percent to 23 million pounds and revenues to $181,848.

In the same first six periods of 1965, Gordons originated 32.6 million pounds of freight at Baton Rouge, Geismar, Plaquemine and Luling which produced $383,000, of which 12.5 million pounds, which produced $95,000, moved to Memphis, the rest to other points on its system. In the last three of these accounting periods it originated just 1.65 million pounds at St. Francisville and Zee which produced $11,350. Only 43,000 pounds of this freight moved to Memphis.

Gordons contends that if the Strickland applications are approved Strickland could originate traffic at Zee or St. Francisville and by routing it through New Orleans take it directly to points competitive with Gordons which, of course, is not possible under England's existing rights in combination wth Strickland's. Gordons likewise reasons that if both the Strickland and Copperstate applications are

approved Copperstate could then originate traffic at Geismar (a point south of U. S. Highway 190), take it to New Orleans for interchange with Strickland which could then move it to Memphis, St. Louis, Chicago or other Gordons points. Gordons' fears in this regard will be entirely alleviated by the conditions and restrictions to be imposed on the rights emerging from these transactions and applications as more fully detailed hereinafter. Strickland will not by reason of approval herein be authorized to move traffic from a point north to another point north of U. S. Highway 190 via New Orleans or points within 10 miles of New Orleans, and to the extent authorized to serve points north of that highway could only bring it to New Orleans for interchange with other carriers or for movement by itself over existing routes via Texas points. In like manner Copperstate will not be authorized to handle traffic having a subsequent or prior movement via any point in Louisiana north of U. S. Highway 190. To this extent Gordons and other north-south carriers would be protected against solicitation by Copperstate of northbound traffic originating at points in New Orleans beyond the 10-mile radius of New Orleans.

In opposing the Strickland applications so far as operations between New Orleans proper and those north of Louisiana are concerned, Gordons makes the point that when in the last three months of 1960 Strickland was using Illinois Central piggyback service it was handling a relatively small amount of traffic to and from New Orleans, and this is true as in those months of more than 54,000 shipments handled between Gordons and Strickland, Strickland handled less than 13 percent (7,118 shipments) which accounted for an equal percentage of the revenues. Strickland then originated only 9.5 percent of the shipments (966) originated by Strickland and Gordons in these months. Comparing Strickland's small volume in those

months with its volume in the last three months of 1964 shows a decided increase in total volume but the 25,577 shipments Strickland handled did not all move to or from points competitive with Gordons. One-fourth of them moved to or from Dallas; another one-fourth to or from St. Louis, Chicago and Milwaukee; a half to or from points east and north of the latter points; and less than one percent moved to or from Texarkana, Little Rock and Memphis. To the extent that approval would authorize Strickland to operate over direct routes between New Orleans and Memphis, Gordons, Arkansas-Best, Campbell Sixty-Six and other protestants similarly operating would be subjected to a new service not heretofore feasible under Strickland's own rights and not shown to be required under the unified rights. Accordingly the acquired rights as redescribed will be further restricted to prohibit the handling of traffic moving between New Orleans and points within 10 miles of New Orleans, on the one hand, and points in the Memphis commercial zone as defined by the Commission, on the other.

Gordons had total revenues in 1963 of $22.4 million when its operating ratio was 95. In 1964 it had revenues of $23.5 million when its operating ratio was 90.7. For the first quarter of 1964 on revenues of $5.3 million it had a net income of $469,000 and in the first quarter of 1965 it had a net income of $254,000 from revenues exceeding $6.4 million. Its operations have been uniformly profitable and should not be curtailed in any manner by approval of the instant applications.

Braswell: Braswell opposes all applications. It operates over regular routes between points in the Greater Los Angeles Area on the west, Memphis and Jackson, Tenn., and New Orleans and Baton Rouge on the east, Houston and San Antonio on the south, and Oklahoma City on the north, but by reason of exercising temporary lease au-

thority on March 18, 1963 in No. MC-F-8358 (the Shayler case) it has extended its operations over irregular routes from a 125-mile area around Oklahoma City, to St. Louis and Chicago, and from an area in north-central Illinois including Chicago and also from St. Louis to points in Oklahoma. In *Braswell Freight Lines, Inc.—Purchase—Shayler,* 101 M. C. C. 1, decided December 20, 1965, Braswell was authorized to purchase the Shayler operating rights subject to conditions canceling some rights to be acquired, and prohibiting Braswell from combining the rights acquired with its own to provide service to or from points in Arizona and California.

Braswell maintains terminals at the 10 points mentioned and among 15 others at Dallas, its present or future headquarters, Shreveport, Ruston, Monroe and Alexandria. It operates 170 trucks, 209 tractors and 329 trailers and has 600 employees.

Braswell schedules its operations to provide service between New Orleans and Baton Rouge, on the one hand, and, on the other, Memphis, Shreveport and Dallas the first morning and Oklahoma City and Tulsa the second morning. In the first six months of 1965, it transported a total of 5,577 shipments weighing 11.9 million pounds and producing revenues of $125,595 from New Orleans and Baton Rouge to Shreveport and Memphis, and transported 2,433 shipments weighing 8.3 million pounds and producing revenues of $79,000 from those points back to New Orleans and Baton Rouge. The vast majority of this traffic moved to and from Memphis so if Strickland's acquired rights are restricted from using them in conducting operations to and from Memphis Braswell would be afforded appropriate protection. If Strickland should continue service between the northern Louisiana points Braswell is authorized to serve and Strickland will be authorized to serve and New Orleans it would be continuing a service England has provided which would not be likely to affect Braswell at all.

Red Ball: Red Ball opposes all applications. Its regular routes extend throughout a system bounded by Denver, Colo., on the northwest, Santa Fe, N. Mex., on the west, Houston on the southwest, New Orleans and Mobile on the southeast and Memphis on the northeast. It serves some 1,375 points in nine States conducting operations as pertinent to the Strickland applications between New Orleans, on the one hand, and, on the other, points in Louisiana which England has also served such as Bunkie, Tate Cove, Alexandria, Monroe, Ruston, Bastrop, Sterlington, Shreveport, but also numerous other Louisiana points which England has not served, and Memphis, Dallas, Fort Worth, Wichita Falls and Amarillo, Tex. It operates 485 trucks, 483 tractors and 1,025 trailers and maintains terminals at 85 locations.

So far as the Strickland applications are concerned Red Ball believes that traffic it now originates at Amarillo, Wichita Falls, Fort Worth, Arlington, Dallas and their commercial zones that is destined to points in Louisiana, Mississippi, Alabama or Florida would be subject to diversion by Strickland by reason of its obtaining a shorter route from Dallas to New Orleans. In a two week period in June of 1965 Red Ball originated 2,233 shipments at these Texas points accounting for 1.2 million pounds of its freight. It also fears that traffic which it originates at Louisiana points north of U. S. Highway 190 as well as New Orleans and Baton Rouge that moves to the same Texas points and in a northerly direction, or as to interior Louisiana points to New Orleans for export, would likewise be subject to diversion by Strickland. In this connection it shows that in the 2-week period in question it originated traffic at Sterlington and Monroe moving to New Orleans or Mississippi points, at Alexandria moving to Alabama, Mississippi and Florida, at Baton Rouge and other nearby points moving to

Texas and northerly points, and at New Orleans moving to points in Louisiana, Texas and westerly and northerly. These shipments totaled 1,618 and weighed 5.1 million pounds. The amount of revenues this traffic yielded is shown but the proportion accruing to Red Ball is not shown.

In 1962 Red Ball acquired control of Couch Motor Lines, Inc., and after that carrier's name was changed to Red Ball Motor Freight (Southeast), Inc., Red Ball caused it to be merged into itself in July of 1964. For 1963 and 1964, Red Ball itself had gross revenues of $19.2 million and $26.9 million, with operating ratios of 91.9 and 91.6 respectively. The revenues of Red Ball and its affiliated carrier for 1964 were $30.4 million. For the first quarter of 1964 excluding and the first quarter of 1965 including the revenues of the affiliated carrier the total revenues were $4.88 million and $7.98 million, respectively, and operating ratios were 93.8 and 94.5, respectively.

Strickland's operations from and to Dallas would be changed very little as a result of approval of the instant transaction as the route via Shreveport is just 76 miles shorter than its present deviation route via Kinder. Red Ball has shown that Strickland has not served its authorized points of Wichita Falls and Corsicana, Tex., except on truckload shipments, volume less-than-truckload, and ltl shipments which can be loaded with the truckload, and volume shipments and maintains no terminals nearer to those points than Dallas. Red Ball fears that approval herein will make Strickland a formidable competitor to it on Wichita Falls-New Orleans and similar traffic, but its fears are largely unfounded so far as approval herein is concerned. Strickland could become just such a competitor without approval of the instant transaction. The 76-mile shorter route surely would not

be the factor to decide Strickland to commence active solicitation for Wichita Falls-New Orleans traffic.

Traffic which Red Ball originates at Sterlington, Monroe and Alexandria which is moving beyond New Orleans is the kind of traffic England itself handled and to the extent Strickland would continue to handle similar traffic Red Ball and other protestants in a similar position would not face new competition. They would merely face the same competition from a different carrier if Strickland is substituted for England in this regard.

Although Red Ball shows that it originates traffic at New Orleans destined to other points in Louisiana, Texas, west of Texas and north of Louisiana, England also actively provided this service in competition with it and the substitution of Strickland again would merely substitute one competitor for an existing competitor as in no sense would the operating rights of England remain nonexistent in event of denial of the Strickland applications.

East Texas Motor Freight: East Texas opposes all applications. Its interest in the Strickland applications is that through unification of Strickland's present regular routes between Beaumont and New Orleans with those of England, it could institute a service "from Beaumont to such places as Shreveport, Little Rock, Memphis, St. Louis and Chicago" which it contends would result in diversion of traffic from it. Ryder and East Texas presently provide joint-line service from Beaumont, Ryder being the originating carrier and East Texas the carrier beyond Houston.

Strickland contends that approval of its applications would not shorten its route between Beaumont and the northerly points mentioned by East Texas but does not meet the latter's contention that Strickland is not presently authorized to operate from Beaumont over direct routes to Texarkana and beyond. Assuming, however,

that approval would afford Strickland authority for the first time from Beaumont via New Orleans and Shreveport to Texarkana and beyond, the circuitous mileage would not make it a serious competitor for such traffic.

Herrin: Herrin opposes all applications. It operates over regular routes extending between Dallas, Fort Worth, Waco and Houston on the west and Macon and Savannah, Ga., and Jacksonville, Fla., on the east via Shreveport and Memphis or Little Rock and Memphis on the north, and Beaumount, Lake Charles, Lafayette, Houma, Baton Rouge, New Orleans, and Pensacola, Fla., on the south, and additionally serves between New Orleans, Baton Rouge, Abbeville, Lake Charles and intermediate points in Louisiana, on the one hand, and Alexandria, Shreveport, Monroe and Memphis among others, on the other hand.

Herrin operates a fleet of 178 trucks, 226 tractors and 485 trailers of which 11 are flat beds, 4 are gondola-type and 8 are refrigerated trailers. It operates 9 terminals in Louisiana, 4 in Texas, 5 in Georgia, 2 each in Florida and Arkansas at the points outlined above, and 1 at Memphis. It serves over 280 points in Texas (counting plant sites and points included in commercial zones), and over 540 such points in Louisiana.

Herrin, as other similar carriers, performs the pickup of freight after noon of each day at its terminal points, and effects delivery before noon, performing intercity line-haul operations during the late afternoon and night. It performs truckload service on call. It utilizes radio for dispatching pickup equipment and at larger cities regular pickup routes are followed. In Houston it has 51 pickup units in operation, 8 at Beaumont, 48 at New Orleans, 13 at Baton Rouge, 20 at Lake Charles, 40 at Dallas, 9 at Shreveport, 6 at Houma, 18 at Lafayette and 21 at Memphis. In serving its 3,000 customers in Houston Herrin

performs from 350 to 375 pickups each day. It performs 250 pickups in New Orleans daily and 25 in Baton Rouge. Baton Rouge accounts for a greater proportion of truckload traffic so there are fewer pickups performed there.

Herrin actively performs operations over its routes which are in the areas covered by the rights of vendors, and if the transactions are approved and the section 207 applications granted service by Strickland and Copperstate would virtually blanket the area served by Herrin in Texas, Louisiana, Arkansas and at Memphis so that Herrin has a vital stake in the outcome of these proceedings.

In the conduct of its ltl operations Herrin offers overnight service between the points it serves in Texas around Houston on the one hand, and those it serves in southern Louisiana on the other, offers second morning service between Dallas and New Orleans. Second day service is also offered between its Texas points around Houston, on the one hand, and those it serves in Georgia and Florida on the other, as well as between its southern Louisiana points and those it serves in Georgia and Florida. It also offers second morning service between Memphis and New Orleans, but here its routes are somewhat circuitous. Overnight service is offered between some points where normal ltl second morning service is offered.

Service by Herrin in the Areas Affected by the Strickland Applications: Herrin provides interstate service between New Orleans, on the one hand, and, on the other, Alexandria, Shreveport, Monroe, Little Rock and Memphis and intrastate service between New Orleans and Alexandria and Shreveport. Strickland proposes to perform similar services under the England rights unified with its own between New Orleans and these same points. In June of 1964 Herrin transported 1,079,391 pounds of freight from New Orleans to those points and 1,202,847 pounds to such points in June of 1965, an increase of 10 percent. The

volumes in pounds to the individual points were: June, 1964—Alexandria 146,432, Shreveport 523,142, and Memphis 409,817; and June, 1965—Alexandria 203,666, Shreveport 529,472, and Memphis 469,709 pounds, in each instance showing a slight increase for each point in June, 1965.

In the reverse direction Herrin transported 802,852 pounds of interstate traffic from Alexandria, Shreveport and Memphis in June of 1964 back to New Orleans and 1,421,153 pounds in June of 1965, an increase of 43.5 percent, with Memphis alone accounting for an increase from 653,276 to 1,057,494 pounds, an increase itself of over 38 percent. Under the conditions to be imposed herein Herrin would not lose any of the Memphis-New Orleans traffic as a result of the proposed transactions and is unlikely to be affected at all from approval of the Strickland applications in the manner herein recommended.

Strickland requests that the findings of fact and conclusions as set forth in Appendix F be adopted, but protestants request that their requested findings, which are set forth in Appendix K, also be adopted, and their requested findings inextricably relate to all proceedings and can be given consideration only after an opportunity to consider the evidence and arguments in the Copperstate proceedings.

The Copperstate Applications.

The corporate organization, history and affiliations of Copperstate and its subsidiary companies, including Valley Motor Lines, Inc., and Valley Express Co., and the purchases of additional operating authorities are detailed in *Consolidated Copperstate Lines, Inc.—Pur.—Sunset M. Lines, Inc.*, 85 M. C. C. 113, *Valley Motor Lines, Inc.—Pur. —Pierce Freight Lines, Inc.*, 87 M. C. C. 317, and *Consolidated Copperstate Lines—Purchase—Nielsen*, 90 M. C. C. 483. Copperstate, Valley Motor and Valley Express consti-

tute the Copperstate system of motor carriers. Copperstate holds authority to operate between the Los Angeles area and numerous points in Texas via regular route via Phoenix and other Arizona points and New Mexico entering Texas at El Paso. It holds regular route authority extending from Phoenix into Salt Lake City, Utah. Valley Motor operates between the Los Angeles area and Portland, Oreg., via San Francisco and Sacramento, Calif. Copperstate and its subsidiaries operate as one system. The system operates under division such as "Copperstate", "Valley", "Nielsen", and "Sunset" to identify the areas the system may serve in California, Arizona, and New Mexico, Oregon and California, and in Texas respectively. Operations under temporary authority are referred to as the England Division but are in turn under the Sunset Division. A reference therefore to Copperstate refers to the system or to any division depending upon the area in question and the context.

Under the Sunset Division Copperstate operates in Texas between El Paso on the east and Houston on the west, Amarillo, Fort Worth and Dallas on the north, and San Antonio on the south. Whereas England of Texas is authorized to operate from Houston to points in Texas on and east of a line extending from Wichita Falls via Abilene, San Angelo, Brady, Fredericksburg and San Antonio to Laredo, Copperstate's routes in the same area are between Houston and Fort Worth and Dallas via Austin, Brownwood, Cisco and Stephenville, and are circuitous. Its other routes in Texas extend between Abilene and San Antonio via Ballinger, San Angelo, Brady and Fredericksburg, between Cisco and Brady, between San Angelo and Brownwood via Ballinger, between San Antonio and San Angelo via Austin, Brownwood and Ballinger, and between Fredericksburg and Austin.

Copperstate itself maintains 43 terminals including 12 in

Arizona, 13 in California, 17 in Texas and leases the terminal England had leased in New Orleans. Valley maintains 10 terminals in Oregon and 1 in California and shares the other terminals of Copperstate in California. The Copperstate system operates 671 trucks, 733 tractors, and 1,140 trailers. It employs 3,000 persons.

Under an agreement executed in July 1964 Copperstate would purchase all of the operating rights of England of Texas; those portions of the operating rights of England under No. MC-57946 (Sub-No. 2) covering the transportation of general commodities, with exceptions, over irregular routes, (1) from New Orleans and Plaquemine, La., to Baton Rouge, Thibodaux, Ponchatoula and Hammond, La., and (2) between New Orleans and Plaquemine; and that portion of those under No. MC-57946 (Sub-No. 3) covering the transportation of general commodities, with exceptions, over irregular routes, between New Orleans and points within 10 miles of New Orleans, on the one hand, and, on the other, points in Louisiana on and south of a line beginning at the Mississippi-Louisiana State line and extending along U. S. Highway 190 to junction U. S. Highway 165 at Kinder, thence along U. S. Highway 165 to its junction with U. S. Highway 90 near Iowa, and thence along U. S. Highway 90 to the Louisiana-Texas State line,[20] except from New Orleans to Baton Rouge, Thibodaux, Ponchatoula and Hammond; and the motor-vehicle equipment of England consisting of 16 trucks, 27 tractors and 15 trailers, for a total consideration of $400,000, the equipment to be transferred free and clear of all liens and encumbrances. The agreement assigns $225,000 as the value of the equipment and $175,000 to the operating rights. An independent appraisal report shows the value of the equipment to be $209,950. Upon execution of the agreement $40,000 was placed in escrow. Upon consummation the escrowee would

20. Generally referred to herein as on and south of U. S. Highway 190 or as points in southern Louisiana.

pay over the $40,000 and Copperstate would make a further down payment of $110,000 in cash. After the application of these amounts and the application of monthly rentals paid during temporary authority the remainder of the purchase price would be evidenced by five promissory notes of equal amounts, one of which would be payable each year following the date of consummation and would bear interest at the rate of six percent per annum on the unpaid balance until paid.

Under temporary authority, as previously stated, Copperstate pays $2,500 a month as rental for the lease of the operating rights, all interest due on the indebtedness standing against the equipment, and up to $105,000 on the principal so standing against it. Upon consummation, the amounts paid under the terms of the temporary lease authority other than interest would be applied against the remaining portion of the purchase price.

The agreement also provides that in the event of denial of the section-5 transaction Copperstate would purchase the equipment for the agreed $105,000. This amount would be paid through application of an applicable portion of the equipment rentals paid during temporary authority. It is recited in the agreement that as of the date of its execution the balance due on the equipment was $114,727.91, which included interest to that date and the succeeding monthly payment would have been $5,834.29 and thereafter by that amount less interest reductions. At this rate the $105,000 in principal would be paid in approximately 18 months. Copperstate would meet the financial terms of the agreement from cash on hand.

A balance sheet for Copperstate as of March 31, 1965, shows total assets of $6,695,140, including current assets $2,750,361 of which $1,176,788 was cash. Its liabilities included current liabilities $1,889,530 which in turn included accounts payable of $880,163; total long-term obligations

of $2,113,320 of which $463,730 is due within one year, capital stock $13,000 and earned surplus $2,492,725. Its ratio of long-term debt to combined long-term debt and stockholders' equity was 45.8 percent and its ratio of current assets to current liabilities was 2.8 to 2.

A consolidated balance sheet including Copperstate, Valley Motor and Valley Express as of March 31, 1965, shows assets in excess of $11.7 million, a ratio of current assets to current liabilities of 5.4 to 3.5; and its ratio of long-term debt to combined long-term debt and stockholders' equity was 38.6 percent.

Income statements for Copperstate for 1964 and the first three months of 1965 show operating revenues of $14,095,326 and $3,717,149 and net income before provision for income taxes of $139,667 and 150,963, respectively. Income statements for Copperstate and its subsidiaries Valley Motor and Valley Express for 1963, 1964 and the first 3 months of 1964 show operating revenues of $31,568,670, $33,370,249, and $8,692,036, and net income before provision for income taxes of $380,525, $936,033, and $457,553, respectively.

Copperstate estimates that had it operated under the rights it seeks to acquire from vendors in 1963; obtained the same revenues as England of Texas ($53,362) and the 40 percent England estimates are applicable to the territory involved ($305,952), it could have achieved savings of $97,493 to produce those revenues and would have obtained net income before provision for income taxes of $101,559 compared to the loss England of Texas incurred and the small profit England obtained from this area. To obtain this result Copperstate assumed that the 40 percent allocation was applicable to revenues as well as expenses and that it could have produced like revenues without England's terminal at Houston and with fewer employees and savings

in equipment maintenance, sales, tariffs, insurance and safety.

Copperstate further estimates that by assuming that revenues obtained by vendors in the first 3 months of 1965 projected to a year would mean additional revenues of $648,000 could be obtained by it in that year had it operated under the rights, it could have increased its net income before taxes by $95,000. On this basis it should recoup the amount assigned to intangibles in a reasonably short period of time.

Operations of the England Companies Pertaining to the Transaction in No. MC-F-8808: Prior to the cessation of operations by the England companies they performed service on and south of U. S. Highway 190 separately and in combination. The separate over-the-road operations conducted by England included traffic which was brought by it to New Orleans in the Strickland-England interchange service and there having first been given to Strickland then back to it was delivered by England at southern Louisiana points. This traffic will not here be considered as evidencing a user of the rights Copperstate seeks to acquire. England itself did, however, receive traffic at New Orleans from other carriers and did engage in a bona fide distribution service from that point. On 14 selected days in the months of November 1963 through April 1964, it transported a total of just under 1,300 shipments which weighed a total of 2,949,000 pounds. As more clearly shown in Appendix G, 1,162 of these shipments were transported to 36 points located generally between New Orleans and Baton Rouge and also located between New Orleans and Lake Charles. They weighed an aggregate of 1,119,000 pounds and consisted of mostly ltl shipments weighing an average of 962 pounds each. England also originated 136 shipments at southern Louisiana points and then interchanged them at New Orleans. They accounted for 1.8

million pounds and weighed an average of 13,495 pounds each. Their origins as shown in Appendix G are generally located between Baton Rouge and New Orleans.

The 14-day study establishes that England actively engaged in lawful operations between New Orleans, on the one hand, and, on the other, a sufficient number of the points in southern Louisiana to be representative of all and to meet the "test of substantiality" applied in "grandfather" proceedings and followed in *New Dixie Lines, Inc.—Control —Jocie Motor Lines, Inc.*, 75 M. C. C. 695 (1958), and later cases. However, England engaged in additional operations in combination with England of Texas using the substituted rail service of Southern Pacific.

While England held authority between New Orleans and Lake Charles and England of Texas from Houston to Lake Charles, neither held unlimited authority from Lake Charles to Houston. They could provide joint-line service from Houston to New Orleans via Lake Charles, their common point, but they needed a third carrier to fill the gap from Lake Charles to Houston if operations were to be conducted from New Orleans to Houston. Thus it was that Southern Pacific is said to have become that carrier.

In August 1963, the England companies entered into an arrangement for the substitution of rail piggyback service for the joint-line motor service of England of Texas from Houston to Lake Charles and of England from Lake Charles to New Orleans in eastbound service; and the motor service of England from New Orleans to Lake Charles and England of Texas from Lake Charles to Houston in westbound service. The terms were that Southern Pacific was to receive $75 for a one-way haul of one loaded trailer and $120 for two loaded (or empty) trailers between New Orleans and Houston. It was to receive $63 for a one-way haul of a loaded trailer between New Orleans and Lake Charles and $54 for a one-way haul of a loaded trailer be-

tween Lake Charles and Houston. Empties were slightly less in this service. No rates were published for two trailers at one time moving between New Orleans and Lake Charles or between Houston and Lake Charles, and there is no evidence to show that trailers were ever loaded or unloaded from flat cars at Lake Charles or their contents rehandled there. Under the arrangement the trailers were moved between the Southern Pacific Englewood ramp in Houston and its Avondale ramp in New Orleans.

Prior to the implementation of their agreement the England companies and Southern Pacific filed an application for relief under the Fourth Section of the act and to establish and maintain via a motor-rail-motor route the same rates applicable to the same points via an all-motor route and to substitute all-rail service for all-motor service without observing the long and short haul provisions of that section. By a supplemental Fourth Section Order of October 11, 1963, served October 23, 1963, their application was granted and they were authorized to establish the requested rates over the direct motor-rail-motor route "for the transportation of property which the applicant motor carriers are authorized" to transport, subject to certain intermediate point limitations, and provided that Southern Pacific received the proper compensation for its haul of loaded trailers. England of Texas held very little authority from Lake Charles to Houston (cotton, cotton linters, wool and mohair), so the piggyback of general commodities from New Orleans via Lake Charles could not be performed under the combined authorities of England and England of Texas, but nevertheless was performed by interchanging traffic with Southern Pacific.

In the performance of westbound operations England would load trailers at New Orleans or Baton Rouge with freight of all kinds moving to Houston or beyond bringing the Baton Rouge freight to New Orleans and loading all

trailers aboard Southern Pacific flat cars at its Avondale yard. Southern Pacific transported these trailers to Houston where England of Texas again took possession of them either delivering the traffic or interchanging it for movement over-the-road beyond. In almost no instance did England of Texas perform the beyond movement of this freight under its motor carrier authority. The movement of this traffic from Lake Charles to Houston was by the railroad as pure railroad freight under its own authority. In this manner during the 6-month period immediately prior to cessation of their operations England originated 638 shipments moving westbound accounting for 960,000 pounds. The average weight of each such shipment was 1,005 pounds.

Most of this westbound traffic moving in joint motor-rail substituted service was originated by England at New Orleans and points within 10 miles of New Orleans but 32 shipments weighing 90,300 pounds were originated in Baton Rouge and moved over the road to New Orleans and thence in the joint motor-rail substituted service to Houston. This type of movement (from Baton Rouge to Lake Charles) is not authorized under England's rights alone as it is authorized under its Sub 2 authority to operate from New Orleans to Baton Rouge and under its Sub 3 authority from Baton Rouge to New Orleans, but when it operated from Baton Rouge to New Orleans it had used all of its authority as to that shipment and could not thereafter move it to Lake Charles. This was a forbidden cross-haul of England's Sub 3 radial authority and is the very type of operation Copperstate has conducted under temporary authority and seeks to continue if its two applications are approved.

In eastbound operations the traffic which England of Texas solicited and originated at Houston, consisting almost entirely of ex water-borne traffic, was billed by England

of Texas as joint-line motor service with England to be interchanged at Lake Charles, and was transported by Southern Pacific in piggyback service from Houston to New Orleans via Lake Charles. Nothing was done to the trailers or their contents until they reached New Orleans where England unloaded them and delivered or interchanged the traffic. The necessary paperwork to perfect the interchange of particular freight was done by England employees at New Orleans. In this manner in the 6-month period immediately prior to the cessation of their operations the England companies transported 474 shipments weighing 2,347,218 pounds from Houston to New Orleans.

Except for performing the illegal cross-haul from Baton Rouge to Lake Charles, the manner in which England of Texas and England performed their joint-line motor-carrier operations using substituted rail service in their eastbound operations and the joint motor-rail service using substituted service for the motor-haul portion of the westbound service has not violated any of the provisions of law pertaining to the licensing or certificate requirements of the Interstate Commerce Act. The manner in which the revenues are agreed to be divided between carriers is not governed by law and is of no concern to the Commission. The question of whether in conducting westbound operations the parties have violated any provisions of the act for failure to file proper tariffs and observe proper charges, or have acted beyond the provisions of the Fourth Section relief they obtained, is not before the Commission or the examiner in these proceedings. Furthermore, the proposal here is to end this practice and for Copperstate, if permitted, to conduct its own over-the-road operations between Houston and New Orleans and if it obtains authority between those points there will be no question of its right to participate with Southern Pacific in substituted service between those points, even though there is evidence that it would discontinue such participation.

Upon the exercise of temporary authority on October 28, 1964, Copperstate resumed the same type of substituted and joint motor-rail service as the England companies had provided but around December 7, 1964, under an arrangement with Strickland, which of course is authorized to operate from Lake Charles to Houston, commenced a joint-line motor service from New Orleans to Houston interchanging traffic at Lake Charles in all-highway over-the-road operations as well as in substituted rail service. Copperstate then commenced an all-motor over-the-road service from Houston to New Orleans and of course between New Orleans and Lake Charles.

In sum Copperstate is conducting an all-motor service from Houston to New Orleans as well as a substituted service from Houston to New Orleans; a joint-line motor and a joint-line motor substituted rail service from New Orleans to Houston. It likewise is performing all motor over-the-road service between New Orleans, on the one hand, and, on the other, points in southern Louisiana.

In a 5-month period following its exercise of temporary authority Copperstate transported 2,481 shipments weighing 2.2 million pounds in truck service over the road and 6,245 shipments weighing 7.3 million pounds all in eastbound service from Houston to Lake Charles, New Orleans and points within 10 miles of New Orleans, Baton Rouge and Plaquemine, with shipments destined to other Louisiana points located south of U. S. Highway 190 being interchanged at Lake Charles or New Orleans and those moving beyond Louisiana being interchanged at New Orleans.

In westbound service in the same 5-month period Copperstate originated at Baton Rouge or New Orleans or received through interchange at New Orleans 3,421 shipments weighing a total of 6 million pounds. Of these, and commencing December 7, 1964, 1,877 shipments weighing 2 million pounds moved to Houston and beyond in over-

the-road service with Strickland serving as the interchange bridge carrier from Lake Charles to Houston. The remaining 1,545 shipments weighing 4 million pounds moved in one of two ways. In one the same procedure as previously used by vendors was employed. For a fixed fee per trailer Southern Pacific would transport traffic Copperstate tendered to it at New Orleans as piggyback traffic which Southern Pacific transported from New Orleans via Lake Charles to Houston where Copperstate took back the trailer. Southern Pacific's division of the revenue for its haul as "pure rail traffic" from Lake Charles to Houston was again included in the amount it charged to transport the loaded trailer. The other procedure was for Copperstate to execute a joint billing on traffic it obtained at New Orleans or Baton Rouge with Strickland becoming the bridge carrier. This traffic was moved in substituted service for the same fixed fee per trailer, but this traffic was moved through Houston to points not included in the Rocky Mountain Tariff, including some points in Texas and some points west of El Paso in New Mexico. There is no breakdown to show the number of shipments in these last categories.

Copperstate has continued—as England itself did—to solicit traffic at Baton Rouge for movement to Lake Charles and beyond and asserts that it would continue to do so absent specific operating authority under Sub-21 until "told by the Commission" to stop. As England is without authority to transport traffic from Baton Rouge to Lake Charles, Copperstate under a lease of the same rights is likewise without such authority and would not obtain such authority unless it obtains it under the Sub-21 application.

Even prior to temporary authority Copperstate handled a vast amount of traffic at Houston moving from, to or through New Orleans and it is for this reason that it seeks to acquire the properties of the England companies and

to obtain authority over regular routes between Houston and New Orleans. In the first 10 months of 1964, just before it exercised temporary authority, it interchanged 12,609 shipments with Herrin, Ryder, Strickland and England weighing over 7.7 million pounds. Their share of the revenue from this traffic was $188,704. Of that amount $69,101 was their share of the revenue of eastbound traffic Copperstate gave to them and the balance of $119,603 was their share of the revenue of westbound traffic they gave to Copperstate. Eighty-six percent of the revenue accruing to the carriers for their handling the eastbound traffic went to Ryder, 12 percent went to Herrin and less than 1 percent each went to Strickland and England. While the total amount of traffic interchanged between Copperstate and these connecting lines increased in 1964 over 1963, the percentages of the shares of revenues produced by eastbound traffic accruing to them was about the same. Should Ryder lose all of the traffic it interchanges with Copperstate it would be directly affected as a result of approval herein and to what extent will be considered in connection with the presentation of its evidence.

In taking over England's operations under temporary authority Copperstate hired some former employees of England and leased the same terminals England had been leasing at Baton Rouge and New Orleans. At Baton Rouge it has 8 employees where it uses 6 pickup trucks and stations 10 trailers. At New Orleans it has 25 employees, utilizes 10 trucks and 4 tractors for pickup and delivery work in New Orleans and vicinity. It engages in a measure of local operations between New Orleans, on the one hand, and, on the other, points in southern Louisiana including Baton Rouge, depending, as England did, upon interchange traffic. Most of this freight involves movements east or north of Louisiana. It interchanged with nine carriers but the most traffic was interchanged with three, of which

Deaton Truck Lines, Inc., of Birmingham, Ala., and Johnson Motor Lines, Inc., of Charlotte, N. C., support approval of these applications, as does Central Truck Lines, Inc., of Tampa, Fla. In the aggregate these carriers serve points located in most of the South so that Copperstate would have no problems finding carriers at New Orleans willing to interchange traffic.

The 198 shipments Copperstate handled between New Orleans, on the one hand, and, on the other, points in southern Louisiana in the five months from November 1964 through March 1965, weighed 1.2 million pounds and averaged 6,000 pounds per shipment. They moved between New Orleans and such points on the northern portion of the regular route it seeks in the Sub-21 proceedings as Baton Rouge, Gramercy, Laplace, Geismer, Taft, Reserve, Norco and Whitehall but these points are either within 10 miles of New Orleans and are between New Orleans and Baton Rouge; and such points on the southern route as Houma, New Iberia, Morgan City, Jenerette, Lafayette, Rayne and Crowley, and also Marrero and Metairie which are in the New Orleans commercial zone.

Operations by England of Texas: In addition to its function as originator of eastbound traffic moving in substituted service, England of Texas also performed the delivery in Texas of other ex water-borne shipments, most, if not all, of which moved in truckload lots. In a 6-month period immediately preceding the cessation of its operations England of Texas transported just 14 ltl shipments from Houston which weighed 73,363 pounds averaging 5,240 pounds each. Of these 1 each moved to Port Arthur, La-Porte, Corpus Christi, and Irving to which it transported no other shipments. The rest of the ltl shipments moved to points to which truckload shipments also moved. The 71 truckload shipments it transported in that period weighing 2,666,000 pounds, had an average weight of 37,500

pounds each and moved as follows, with total weights in pounds shown in parenthesis: Arlington 2 (64,308), Dallas 13 (411,501), Fort Worth 8 (138,332), Bryan 1 (31,556), Austin 2 (37,177), Woodville 26 (989,107), San Antonio 9 (276,781), Waco 2 (65,137), Terryville [21] 2 (85,690), Laredo 1 (40,000), North Seadrift 7 (255,492), Sequin 1 (28,360), and Galveston 4 (60,023).

Operations by Copperstate Involving Texas Points: Copperstate reaches Texas points from the West via the El Paso gateway and its operations into and within Texas are under its Sunset Division of which the operations under temporary authority herein are a part. From El Paso its regular routes extend to Houston via San Antonio or Austin; to Dallas via Odessa, Abilene and Fort Worth; and to Amarillo via Odessa and Lubbock. It has cross-connecting routes in central Texas within the destination area covered by the rights of England of Texas connecting such points as Abilene, San Angelo, Brady, Fredericksburg and San Antonio; and also Abilene, Cisco, Brownwood, Brady and Austin. As the western boundary of the area covered by the rights of England of Texas extends from Wichita Falls via Abilene, San Angelo, Brady, Fredericksburg and San Antonio to Laredo, Copperstate already is authorized to serve, both from Houston and via the El Paso gateway, points on routes embraced by the cross-connecting routes mentioned which are within the England of Texas territory. There are large areas in eastern and southern Texas, however, that Copperstate is not now, but would be authorized to serve from Houston, if it should obtain all of the rights of England of Texas.

In a period of five months extending from November of 1964 through April of 1965, Copperstate transported from points west of El Paso (Arizona, California, Utah and

21. There is no postoffice address in Texas shown as Terryville.

Oregon) and east of Houston a total of 3,214 shipments weighing 2,464,000 pounds and averaging 767 pounds per shipment, which were destined to Shreveport and nearly 200 Texas points in the territory covered by the rights of England of Texas, and with few exceptions not already on the regular routes of Copperstate, which it turned to delivering carriers at Dallas, San Antonio or Houston. The study does not distinguish traffic moving via El Paso from that moving via Houston, but Copperstate contends that all except the points north of Dallas (about 25 had traffic to them) could be served via Houston whether the traffic came into Texas via El Paso or via Houston, and would not be "out of line." The study shows that traffic was destined to 67 points south of a line drawn from Houston to San Antonio; to 27 points southeast and east of Houston embracing such points as Galveston, Orange, Port Arthur, Beaumont and points intermediate between those points and Houston; and to 75 points in the area east and south of Dallas but north and east of the routes held by Copperstate; and, of course, to Shreveport. The evidence does not include any plan of operation by Copperstate for serving points in these large areas of Texas in a distribution service that would be without authority to originate traffic at them and whether or not Copperstate could engage in such operations at a profit. Copperstate has not shown that it would participate in the movement of ex water-borne traffic from Houston as England of Texas did. None of the numerous public witnesses expressed a need for revival of operations to these Texas points other than to Beaumont.

Copperstate is authorized to serve in excess of 1,500 points. If these applications are approved it would be authorized to provide the only single-line motor carrier service between New Orleans and 917 points located in Arizona, California, Utah, Oregon and Texas.

Copperstate is a regular-route carrier conducting opera-

tions under reasonably fixed schedules. It proposes for example, to schedule trips departing from Portland, San Francisco and Salt Lake City to arrive in New Orleans on the fifth morning following the day of departure; from Los Angeles to New Orleans the fourth morning; from points in Texas west of Odessa, San Antonio, San Angelo, Big Springs, Midland and Austin to New Orleans the third morning; from the last-named points in Texas to New Orleans the second morning; and from Houston to New Orleans and Baton Rouge overnight. The same relative schedules are proposed for westbound operations.

If the transaction were approved and Copperstate acquired only the operating rights of the England companies as had been exercised by them prior to their cessation; the rights they utilized in combination, and so much of the dormant or little used rights of England of Texas for which Copperstate has proved a need to revive; the remaining rights of England of Texas were canceled as a condition of approval and the emerging rights to the extent they were so operated from Houston to New Orleans, and from New Orleans to Lake Charles were redescribed in terms of regular-route authority; Copperstate would emerge with authority to perform single-line service eastbound over a regular route *from* Houston to Beaumont, Lake Charles and New Orleans also serving points within 10 miles of New Orleans, and Baton Rouge, Ponchatoula, Hammond, Thibodaux and Plaquemine via New Orleans. The only westbound authority which could be redescribed in terms of regular routes would be from New Orleans to Lake Charles serving points within 10 miles of New Orleans but serving no other intermediate points for pickup.

In short, in order for Copperstate to operate from points on its own regular routes over regular routes east of Houston to points in southern Louisiana other than Lake Charles, New Orleans, Baton Rouge, Ponchatoula, Ham-

mond, Thibodaux, Plaquemine and within 10 miles of New Orleans, it must prove public convenience and necessity, and in order to operate westbound from any point in Louisiana to Houston or beyond it must also prove public convenience and necessity.

In order to consider the evidence of public witnesses supporting the application of Copperstate in its No. MC-22167 (Sub-No. 21) for the service which Copperstate is here required to prove public convenience and necessity, their evidence has been placed in several categories in appendixes hereto.

Appendix H contains the analysis of the evidence of 15 shippers or receivers supporting the Sub-21 application for westbound service from Baton Rouge, New Orleans and points in southern Louisiana on the regular routes requested to Houston and beyond.

Appendix I contains an analysis of the evidence of 54 shippers or receivers supporting the Sub-21 application for eastbound service directly to Baton Rouge and other points in southern Louisiana located on the requested regular routes even though they also ship to Lakes Charles, New Orleans and points within 10 miles of New Orleans.

The evidence of 52 other public witnesses relating to eastbound service Copperstate could conduct if the transaction were approved even though the Sub-21 application were denied is analyzed in Appendix J. Their evidence relates to eastbound service to Beaumont, Lake Charles, New Orleans and points within 10 miles of New Orleans (1) from Houston (7 shippers), (2) from other points in Texas on the regular routes of Copperstate (12 shippers), and (3) from points on the regular routes of Copperstate west of El Paso (52 shippers).

A quantitative study of these 141 shippers and receivers shows that perhaps 126 ship their goods in an eastbound direction from points on the present routes of Copperstate

in Oregon, California, Arizona and Texas including Houston to one or more points in Louisiana. Of those shipping from points west of El Paso in terms of the destinations of their traffic 9 ship to Beaumont, 22 to Lakes Charles, 71 to New Orleans of which 42 also ship to points beyond New Orleans of which 42 also ship to points beyond New Orleans, 34 to Baton Rouge and 19 to points in southern Louisiana on the regular routes Copperstate seeks in Sub 21. Of those desiring Copperstate's single-line service eastbound from Texas points other than Houston, 3 ship to Lake Charles, 16 to New Orleans, 9 to points east of New Orleans, 6 to Baton Rouge and 6 to points in southern Louisiana on the regular routes Copperstate seeks. Of those desiring the service of Copperstate eastbound from Houston itself, 11 ship to Lake Charles, 24 to New Orleans of which 1 also ships beyond New Orleans, 17 ship to Baton Rouge and 11 to southern Louisiana points on the regular route sought in Sub 21.

The eastbound service desired by the 52 supporting shippers analyzed in Appendix J could be provided from origin to destination by Copperstate if the transaction alone is approved under a combination of its own regular-route rights and the irregular route rights of the England companies to Beaumont and Lake Charles,[22] to New Orleans,[23] and to Baton Rouge, Ponchatoula, Plaquemine, Hammond and Thibodaux,[24] but to serve the last four points a backhaul from New Orleans would be required.

No one from the shipping or receiving public supported Copperstate service from Beaumont or Lake Charles in any

22. Using England of Texas rights from Houston.

23. Using England of Texas rights from Houston to Lake Charles and England Sub-3 rights from Lake Charles to New Orleans.

24. Using England of Texas rights from Houston to Lake Charles, England Sub-3 rights from Lake Charles to New Orleans, and England Sub-2 rights from New Orleans to Baton Rouge, Plaquemine, Hammond or Thibodaux.

direction. Nor from Houston to points in Texas covered by the rights of England of Texas, nor from Houston to Shreveport.

Of the 15 supporting shippers and receivers desiring Copperstate single-line service westbound, 12 ship from New Orleans and, of these, 4 desire service to points west of El Paso, 10 to points in Texas beyond Houston, and 3 to Houston proper. Of the 2 shippers supporting westbound service from Baton Rouge, 1 desires service to Houston, 1 to points in Texas beyond Houston, and both to points west of El Paso. Just two shippers supported service from a point in southern Louisiana and they were for service from New Iberia. The Abilene dealer in engines which has interplant movements of components of such engines between Abilene and New Iberia (see Appendix I shipper 9) desires a westbound service from New Iberia to Abilene. The other New Iberia shipper is a food processor and distributor of bottled and canned foodstuffs. It transports its products in private carriage for the most part from its packing plant at New Iberia to points in Texas and those west of El Paso as more fully described in Appendix H shipper 8. No other shippers support service westbound from southern Louisiana points other than New Orleans and Baton Rouge. Only one shipper supported service of Copperstate from New Orleans to Houston or beyond on traffic originated east of New Orleans.

PROTESTS TO THE COPPERSTATE APPLICATIONS.

Red Arrow: Red Arrow operates as a motor common carrier wholly within Texas over regular routes extending from Dallas and Fort Worth on the north to McAllen and Brownsville at the Mexican border on the south via Waco, Austin, San Antonio and Alice on the west and Corsicana, Palestine, Houston, Port Lavaca, Corpus Christi and Kingsville on the east, with numerous cross-connecting

routes. It serves 450 points over some 4,600 miles of highway. All of the points Red Arrow serves in Texas from Houston except from Houston to Austin and San Antonio would be new points of service for Copperstafe if it acquired the rights of England of Texas. Revival of operations by Copperstate under all of the rights of England of Texas to full vigor would seriously affect the operations of this carrier.

Red Arrow has terminals at 34 points. It performs operations with 150 trucks, 123 tractors and 219 trailers. It has recently constructed a modern freight terminal at Houston.

Red Arrow offers regularly scheduled ltl service from and to Houston 6 days a week offering overnight service into and out of Houston. It affords truckload service on call 24 hours a day every day in the week. Its operations to and from Houston are a part of the most profitable of its operations. It has not experienced any serious competition from England of Texas within the recent past and contends that the revival of operations by Copperstate under the rights of England of Texas would result in a new service. It further contends that approval would result in a motor carrier (Copperstate) for the first time obtaining authority to conduct a single-line service from New Orleans and Baton Rouge to points in Texas south of U. S. Highway 90 (which extends from Houston to San Antonio).

More traffic moves from Houston to points in Texas west and southwest of that point than in the reverse direction, so that Red Arrow depends upon traffic it receives at Houston including that coming to Houston from Louisiana points and points east thereof. Red Arrow contends that if the applications are approved Copperstate would take traffic from existing carriers which now give to it.

Red Arrow interchanges traffic at Houston moving from and to points east thereof with Herrin, Ryder and Strickland whom it has found to be dependable and reliable.

While it also interchanges traffic with Copperstate at Houston destined to Red Arrow points, it fears that with Copperstate's aggressiveness it would affect Red Arrow's competition because Copperstate would divert all of that traffic to itself. Copperstate would deliver traffic to Corpus Christi which it now gives to Red Arrow at Houston.

In one week in May, 1965, Red Arrow received at Houston 88,340 pounds of freight moving from or through New Orleans or Baton Rouge which was destined to Red Arrow points for which its portion of the revenues was $701.30 and which for 52 weeks would mean revenues for it of $36,468.

Red Arrow also handles ex water-borne traffic from Houston to its points in Texas received from Sea-Land Service. In May of 1965 it handled over 1.8 million pounds of this traffic which produced revenues of $7,831 for it which on an annual basis would amount to over 22 million pounds and yield for it $93,972 in revenues.

Red Arrow transported 49 million pounds of freight a month of which 23 million pounds are interstate in nature. Of this, 3 million pounds a month move from Houston of which 900,000 pounds move to Dallas and Fort Worth. This traffic would be subject to diversion to Copperstate over a direct route if it obtained all of the rights of England of Texas.

Brown Express: Brown Express also operates wholly within Texas over regular routes which are in the same general area as those of Red Arrow. Like Red Arrow's points the irregular-route territory of England of Texas embraces almost every point served by Brown Express. Brown Express operates 144 trucks, 105 tractors and 263 trailers and maintains 14 company operated terminals and 9 commission agencies from which it serves 350 points. Like Red Arrow, Brown Express conducts scheduled operations 6 days a week providing overnight service between

its direct service points. It interchanges traffic at Houston moving between its Texas points and points east of Houston. At Houston it interchanges with Herrin, Ryder, Red Ball, East Texas, Mercury and Strickland as well as Sea-Land.

In one week in July of 1965, Brown Express received 1.15 million pounds of freight at Houston which produced revenues for it of $12,825 of which $12,188 was from traffic destined to Texas points not already on the regular routes of Copperstate. Of its total revenues of $135,199 produced in the same period $44,500 came from interstate traffic so that 27 percent of those revenues are revenues from traffic which would be subject to diversion to Copperstate. This would be about $634,000 annually. Brown Express fears that the single-line service Copperstate proposes from Louisiana points would seriously affect its ability to provide efficient service.

Central: Central is a third protestant operating over regular routes in Texas wholly within the territory covered by the rights of England of Texas. Its routes extend between Wichita Falls, Sherman and Denison on the north and McAllen and Brownsville on the south via Stephenville, Brownwood and San Antonio on the west and Corsicana, Waco, Houston, Beaumont, Orange, Port Arthur, Galveston, and Corpus Christi on the east with numerous cross-connecting routes enabling it to serve 557 points. It operates 419 trucks, 367 tractors and 836 trailers. Of Central's numerous terminals it owns 27, operates 34 itself and has commission agents at 45. Its Dallas terminal alone cost $3 million. It offers pickup and delivery service at all company operated terminals, gives scheduled service between all points 6 days a week and on request gives service 7 days a week.

In a typical week in May, 1965, Central transported 1,010 shipments from Houston to its Texas points weighing

564,466 pounds which produced revenues of $5,547 for it. At this rate in a year it would handle 52,500 interstate shipments from Houston which would produce revenues for it of $288,000.

Central also handles ex water-borne traffic for Sea-Land moving through the Port of Houston. In the same week in May of 1965 as studied above it transported 78 shipments received from Sea-Land weighing 1,215,631 pounds, 47 of which weighed less than 5,000 pounds each, many weighing over 100,000 pounds each. Its revenues for all of this traffic was $5,512. Thus in a year it would handle perhaps 4,000 such shipments and derive revenues upward of $280,000.

Missouri-Pacific and T&P motor subsidiaries: The jointly-managed motor for rail operations of Missouri Pacific Truck Lines, Inc., and Texas and Pacific Motor Transport Company, subsidiaries of Missouri Pacific and Texas and Pacific railroads, provide motor for rail transportation of railroad freight moving over the road and in TOFC service between New Orleans and other points in Louisiana and Texas on the routes sought by Copperstate in Sub-21, on the one hand, and, on the other, Houston and via Houston to many other Texas points including Galveston, Corpus Christi, Brownsville, Texarkana, Marshall, Longview, Palestine, Dallas, Fort Worth, Waco, San Antonio and Laredo. Similar service is provided as far west as Odessa and Hobbs, N. Mex., where interchange is effected with other motor carriers. These railroad subsidiary motor carriers do interchange with other motor carriers at a number of other Texas points but the evidence fails to show that they interchange with any motor carrier at Houston. They operate 213 trucks, 423 tractors and 586 trailers (not including numerous trailers used for TOFC service) throughout their systems covering 10 States.

The Missouri-Pacific Texas and Pacific combined motor for rail operations include an overnight TOFC service between New Orleans and Houston and between New Orleans and Dallas. At Dallas westbound traffic moving beyond Texas is either interchanged with other carriers, continued in TOFC service to Big Springs, or returned to highway operations and interchanged with other motor carriers at Odessa or Hobbs. In this manner these rail subsidiaries are competitive with Copperstate for transcontinental traffic, and have interchanged as much as 800,000 pounds a month with another motor carrier operating west beyond Hobbs. They interchange with two motor carriers at Hobbs and with 7 motor carriers at Odessa.

Like those of other protestants the representative of these carriers fears that because they have not encountered appreciable competition from vendors they will be faced with a carrier offering a more complete transportation service and give them a greater competition than heretofore.

The revenues of Texas and Pacific Motor Transport Co., alone increased $519,000 in 1964 over 1963 and by $77,000 in the first quarter of 1965 over the same quarter of 1964.

Ryder: By Ryder is meant the carrier corporation emerging following the merger of the former Ryder Truck Lines, Inc., into Hoover Motor Express and the change of the name of the surviving corporation Hoover to Ryder Truck Lines, Inc.[25]

Ryder now operates over regular routes between points located in 16 States including Texas, Louisiana, Mississippi, Alabama, Florida, Georgia, Tennessee, the Carolinas, and 7 additional central and midwestern States. In the

25. See No. MC-F-9067, *Hoover Motor Express Co. Inc.—Control and Merger—Ryder Truck Lines, Inc., and Ryder Tank Line, Inc.*, ... M. C. C. ....., approved July 6, 1965 and consummated August 1, 1965.

area concerned here it operates between Houston, Baton Rouge and New Orleans and while its routes extend from New Orleans via Meridien, Miss., to Birmingham, Ala., and thence into Georgia and Florida giving it circuitous routes from Baton Rouge and New Orleans to those destinations, it has pending an application in its Sub-108 proceeding for a more direct route between Baton Rouge and Quincy, Fla., to connect with its Georgia and Florida routes. Its routes in Texas and southern Louisiana extend between Houston, Texas City and Galveston via Beaumont, Lake Charles, Lafayette, New Iberia, Morgan City and Houma over U. S. Highway 90, and also via Baton Rouge. In that area it owns terminals at Houston, Lake Charles, Baton Rouge and New Orleans which cost a total of $1.7 million to construct and it leases terminals at Beaumont and Lafayette.

Ryder operates a total of 607 trucks, 1,325 tractors and 2,624 trailers.

In the area under consideration and as presented for consideration herein by Ryder it conducts operations between Houston and Beaumont,[26] on the one hand, and, on the other, (a) Baton Rouge and New Orleans, (b) other points in Louisiana on and south of U. S. Highway 190 (principally Lake Charles, Lafayette and New Iberia), and (c) points east beyond New Orleans. Its Houston traffic would include traffic moving from and to points west and north beyond Houston.

Based on a one-day study in June 1965, projected to a year Ryder would handle upwards of 26,000 shipments annually between Houston and Beaumont on the one hand, and points in Louisiana and beyond on the other, which would amount to perhaps 117 million pounds of freight and represent $1.13 million in revenues for it. And based

26. Reference herein to traffic moving to and from Beaumont includes traffic moving to and from the commercial zones of Beaumont, Port Arthur and Orange, Tex.

on a study of the same day projected to a year it would handle upwards of 36,000 shipments annually moving between Houston and Beaumont, on the one hand, and, on the other, points on its system or beyond moving beyond either Houston or New Orleans which would weigh 48¼ millions pounds and produce revenues of $1.6 million for Ryder.

Another study Ryder introduced was of traffic moving between Houston and Beaumont on the one hand, and points in Louisiana and beyond on the other, for March and April 1965 and is more realistic to examine traffic which could be diverted from it as a result of approval of the Copperstate applications. The amounts to be given are the projections of the 2-month study to a year and will be in six categories.

The first category is of traffic from Houston (including interchange traffic received there) and would represent 34,680 shipments moving to Baton Rouge and New Orleans (including traffic moving beyond and beyond meaning back to Louisiana points including some points Ryder is authorized to serve) which would total 42.7 million pounds and account for revenues of $529,500 annually. The second category is the traffic moving in the reverse direction which would represent. 15,940 shipments weighing 32.17 million pounds which would produce revenues of $347,500 annually.

The third category includes shipments from Houston to points in Louisiana on and south of Louisiana Highway 190 other than Baton Rouge or New Orleans which was handled directly to those points and these would total 20,496 shipments which would weigh 12.4 million pounds and produce revenues of $179,502 annually.

The fourth category is the westbound shipments from the Louisiana points south of U. S. Highway 190 except Baton Rouge and New Orleans to Houston and beyond and there would be only 2,353 shipments in this category weigh-

ing 7.17 million pounds which would produce revenues of $45,120 annually.

Shipments moving from and to Beaumont represent a small fraction of Ryder's total traffic moving from and to the Houston, Beaumont, Port Arthur and Orange commercial zones. Even so, in a year there would be 2,760 shipments moving from and to those points which would weigh 11.9 million pounds and account for revenues of $97,578. The Beaumont traffic is traffic which the vendors were not authorized to originate and could not handle as a unified carrier except in joint-line service with other carriers. Copperstate itself is not authorized to serve Beaumont and did not receive such authority through the temporary authority herein. However, excluding this traffic there would remain a sizable amount of traffic Ryder now handles from and to Houston and the involved points.

The 2-month study of Ryder traffic will show that of the total traffic it handles moving from and to Houston, 69 percent of the shipments, 79 percent of the weight and 80 percent of the revenue would represent traffic moving to or from Baton Rouge, New Orleans and points beyond those points, and in a year's time would amount to 50,628 shipments weighing 74.17 million pounds which would produce revenues of $877,080 and would clearly be subject to Copperstate's solicitation assuming approval of its applications. To a lesser extent would the traffic Ryder now handles moving between Houston and southern Louisiana points be subject to such diversion because Ryder is able to offer a single-line service to and from those points whereas Copperstate would be required to interchange most of such traffic over Lake Charles, Baton Rouge or New Orleans under the conditions proposed herein.

Ryder contends on brief that traffic producing as much as $3,874,000 would be subject to diversion but as shown above less than a fourth (22.6 percent) would clearly be

directly competitive with the emerging authority and Ryder would have to lose every last bit of this traffic to affect its ability to continue to provide efficient service.

Ryder also contends that it would lose revenues derived from traffic interchanged with Copperstate heretofore, already substantially reduced since temporary authority, but this would amount to no more than $60,000 annually when even under temporary authority they continued to interchange traffic of which Ryder's share would amount to about $36,000 annually.

Saia: Saia, with headquarters at Houma, operates in Louisiana as a motor common carrier in interstate or foreign commerce under a certificate of registration over regular routes between New Orleans and Toomey (west of Lake Charles) over U. S. Highway 90 serving all intermediate points including Houma, Thibodaux, Morgan City, New Iberia, Lafayette, Abbeville, Crowley, Midland, Rayne and Lake Charles, among others, with numerous cross-connecting routes so that in addition it serves points around Houma (as far as Grand Isle), New Iberia and Lafayette (including Opelousas), among others, and within 10 miles of Lake Charles. It also operates between New Orleans and Hammond via Ponchatoula and between Baton Rouge and Slidell over U. S. Highway 190 via Hammond. Some of its routes extend north of U. S. Highway 190 and serve such points as Kentwood and Amite.

Saia operates 49 trucks, 42 tractors and 107 trailers, has 200 employees and maintains 8 terminals.

As Saia depends upon interchange traffic to operate in interstate or foreign commerce it has interchange arrangements with 28 connecting line carriers and 4 freight forwarders at New Orleans. The carriers include 21 motor carriers of which 8 are protestants herein, Strickland, Copperstate, as well as 13 other motor carriers, 4 railroads and

Seatrain. Perhaps one-half of its business comes from the traffic it interchanges with these connections.

During the first 12 days of March of 1965, Saia received 5,153 shipments from these connections moving to points in southern Louisiana which weighed over 2.7 million pounds and which produced revenues for it of $25,742. These shipments weighed an average of 537 pounds each and produced an average of $5 per shipment for Saia.

In the first six months of 1965 Saia received 64,644 such shipments weighing an average of 615 pounds each and producing total revenues for it of $356,668 for an average of just $5.56 per shipment. They also moved to points in southern Louisiana.

Saia believes that all of the above traffic would be subject to diversion to Copperstate if its applications are granted, and opposes them for this reason.

Copperstate on brief points to the evidence which shows that in the 6-month period Saia received just 24 shipments which were originated in California yielding it $176; 64 shipments originated at Houston; and 1 originated in Portland, Oreg. It contends that when Saia's operating ratio was 88.3 for the first quarter of 1965, it enjoyed higher revenue ($610) on traffic from New Orleans to Baton Rouge, on a day selected at random in June of 1965 than on the same day (the fourth Wednesday) of each of the preceding 5 months; that on traffic from New Orleans to points in southern Louisiana it enjoyed a greater volume (314,000 pounds) on the same day in June compared to similar days in the preceding 5 months and enjoyed comparable revenue ($2,649 for June 23 vs. $2,671 for April 28); that it was already competing with Copperstate; and that its fear of diversion is thus unfounded.

Saia did not join in the other protestants' brief. The record shows, however, that the major part of the traffic Saia delivers to southern Louisiana points and Baton

Rouge is traffic which has originated in the same areas as served by Strickland north of Louisiana and other Mississippi Valley carriers and very little of it emanates from Texas or points west thereof. Saia could, therefore, be adversely affected should Copperstate acquire and operate the rights of England between New Orleans, on the one hand, and, on the other, points in southern Louisiana, join those rights with the regular route it seeks between Houston and New Orleans and engage in unrestricted interchange with the same transportation agencies as Saia, including Strickland, and set itself up as a purely local distribution carrier in Louisiana. But this it not Copperstate's overall purpose and plan in acquiring the rights and to secure the regular route, nor does it comport with the proof Copperstate has adduced. Under the rights emerging from the transaction Copperstate will be authorized to transport eastbound traffic from Lake Charles, Houston and authorized points west thereof, and deliver whatever of such traffic is destined to Beaumont, New Orleans or Baton Rouge (as this kind of traffic could have been handled by England of Texas and England in combination) but would not hereafter be authorized to deliver such traffic back to other southern Louisiana points (as England was not) but would be required to interchange it with Saia or other similar carriers and to this extent Saia would not be affected at all by the proposed conditional approval. Copperstate would become a competitor to Saia on traffic other carriers would give it at New Orleans moving to southern Louisiana points but in this service would merely be substituted for England.

No evidence was adduced by Saia relative to traffic which it may have originated at its Louisiana points moving out of Louisiana to the west and no judgment can be formulated respecting the effect approval of the applications would have on such westbound traffic it may have handled.

Service by Herrin in Areas Affected by the Copperstate Applications: Herrin provides service between New Orleans and Baton Rouge, on the one hand and points on the regular route sought in the Copperstate Sub 21 application on the other, which constitutes the principal points in Louisiana on and south of U. S. Highway 190 and also serves Orange, Beaumont, Houston, Waco, Dallas, Fort Worth and points intermediate thereto.

In June of 1964 Herrin transported 719,538 pounds of interstate freight from New Orleans to Baton Rouge, Lafayette, Houma and Lake Charles, and in June of 1965, transported 1,391,785 pounds of both interstate and intrastate traffic from New Orleans to those points. In the reverse direction in June of 1964, it transported 492,499 pounds of interstate traffic from those points to New Orleans and in June of 1965, transported 3,689,799 pounds of interstate and intrastate traffic from those points to New Orleans.

The above tonnages were furnished without relating them to the number of shipments and the revenues they produced. However, a more comprehensive study has been made of traffic moving between New Orleans and Baton Rouge, on the one hand, and, Beaumont, Houston and Dallas on the other, from which certain conclusions become apparent.

In westbound service Herrin transported 5,628 shipments from New Orleans to Beaumont, Houston and Dallas in June of 1964 weighing 10 million pounds and yielding revenues of $127,300. In June of the following year it transported 7,597 such shipments from New Orleans to those points weighing 14 million pounds and yielding revenues of $142,480 an increase of 10.6 percent, which on an annual basis would be a sizable increase.

From Baton Rouge in westbound service Herrin transported 605 shipments to Beaumont, Houston and Dallas

in June of 1964 weighing 2.6 million pounds and yielding revenues of $34,557, and reports that in June of 1965 it transported fewer shipments (559) but weighing 1.25 million pounds more yet yielding fewer revenues ($29,137) than in June of 1964. This does confirm its assertion that fewer pickups are required in Baton Rouge because it handles a larger proportion of volume shipments.

From Houston Herrin transported 14,406 shipments to Lake Charles, Lafayette, Houma, Abbeville, Baton Rouge and New Orleans in June of 1964 weighing 17.7 million pounds and yielding revenues of $215,284 and transported 16,299 shipments from Houston to those points in June of 1965 weighing 14.8 million pounds (down 2.9 million pounds) but yielding revenues of $224,764.

From Beaumont in June of 1964, Herrin transported 878 shipments to the Louisiana points just mentioned weighing 1.95 million pounds and yielding revenues of $14,599; and in June of 1965 transported 967 (89 more) shipments weighing 2.4 (.54 million more) pounds and yielding $20,321 ($5,722 more).

From Dallas in June of 1964 Herrin transported 9.67 million pounds of freight to Houston, Beaumont, its points in southern Louisiana and beyond New Orleans and in June of 1965 transported 8.12 million pounds from Dallas to those points. Its revenue yield from this traffic was $163,100 in June of 1964 and $164,983 in June of 1965. Strickland is already competitive with Herrin on traffic moving from Dallas to Baton Rouge and New Orleans, and Copperstate could become competitive but would be required to operate circuitously over its existing routes via Fort Worth, Brownwood and Austin to reach the Houston gateway. The many direct-line carriers between Dallas and Houston will deter Copperstate from becoming a serious competitor on Dallas to New Orleans traffic.

Western Gillette and O. N. C.: The protest of Western Gillette is in support of the protest of Herrin and the evidence introduced by Oregon-Nevada-California Fast Freight, Inc., a member of the O. N. C. Fast Freight System, is in support of both protests. Western Gillette would be the bridge carrier (between Los Angeles and Houston and Dallas) for traffic moving between points served by O. N. C. in Washington, Oregon, Nevada and California (principally Oregon and Washington) and those served by Herrin in Louisiana, Florida and Georgia.

Western Gillette operates over regular routes between the San Francisco Bay area and Reno, Nev., on the west *via Los Angeles, Phoenix, El Paso and Waco to Houston,* Oklahoma City, Kansas City, Chicago and Memphis on the east. It engages regularly in the interchange of traffic with O. N. C. at San Francisco and Los Angeles and with Herrin at Dallas and Houston. It operates 381 trucks, 395 tractors, 722 trailers and 81 converter gears.

While in the months of April and May 1965 O. N. C. gave Western Gillette 628,000 pounds of freight and Western Gillette gave O. N. C. 557,000 pounds, the amounts moving over the gateways of other carriers is not shown.

Western Gillette itself operates 380 trucks, 395 tractors and 722 trailers in revenue service and is a substantial carrier. It opposes the Copperstate applications because it contends that approval would result in a new competitive single-line service between New Orleans and the area now served by Western Gillette and would give Copperstate a solicitation and sales advantage over the present joint-line services conducted with O. N. C. and Herrin.

Western Gillette and Herrin do interchange traffic moving between Louisiana points and points west of El Paso in quantity over Dallas as well as over Houston but also interchange traffic moving between Los Angeles points and Texas, Oklahoma and other points in the midwest, and

while it is true that approval of these applications would give Copperstate access to the Dallas gateway from and to Louisiana points over a direct route, the discussion hereafter excludes traffic moving between Louisiana points and points in Texas and in the midwest over both Houston and Dallas.

In a typical week in July of 1965, Western Gillette gave Herrin 153,000 pounds of freight at Houston and 57,112 pounds at Dallas which in all yielded $8,106 in revenues for Western Gillette, and was traffic moving from points west of El Paso to Louisiana points or beyond New Orleans but not including Shreveport or Monroe. This would amount to almost 11 million pounds annually moving in such joint service from which Western Gillette could obtain revenues of over $420,000.

In westbound operations in the same week in July Western Gillette received from Herrin 135,228 pounds of freight at Houston and 203,207 pounds at Dallas moving to points west of El Paso which yielded a total of $12,637 for Western Gillette. In a year it would receive 17.6 million pounds at this rate which could yield as much as $637,000 for Western Gillette.

Braswell in re Copperstate Applications: Braswell is not authorized to conduct operations over direct routes between Houston and New Orleans. It is authorized to operate between the Los Angeles area on the west (via Phoenix, Tucson, El Paso and San Antonio) Houston, and (via Dallas and Shreveport) Memphis, Jackson, Miss., Baton Rouge and New Orleans. In performing service between El Paso and points west thereof, on the one hand, and, on the other, Baton Rouge and New Orleans, as well as between San Antonio, Houston and points intermediate thereto and those intermediate between Houston and Dallas, on the one hand, and, on the other, Baton Rouge

and New Orleans, Braswell conducts operations via Dallas and Shreveport.

Braswell's scheduled operations are set up to offer service between Baton Rouge and New Orleans, on the one hand, and, on the other, Dallas overnight; Houston, San Antonio, Waco and Odessa second morning; El Paso second day; Tucson third morning on ltl and second morning on ltl traffic; Los Angeles westbound fourth morning on ltl and third morning on truckload traffic; and eastbound third morning on both ltl and truckload traffic.

In a full Commission report on further reconsideration reported in *Braswell Freight Lines, Inc. Extension—Atlanta,* 100 M. C. C. 482, decided January 17, 1966 (and served February 18, 1966), Braswell has been authorized to extend its operations between Jackson, Miss., and Atlanta over a number of combinations of regular routes via Birmingham, Tuskegee, Attalla and Opelika, Ala., and Columbus, Ga., serving all intermediate points. Should it obtain a certificate from this grant of authority it could engage in transcontinental single-line service, and be directly competitive with Copperstate for the origination of eastbound traffic moving from the Los Angeles area, Phoenix, Tucson, El Paso, the points on its routes extending from El Paso to Houston and to Dallas, which it could transport over the Dallas and Jackson gateways to Alabama and Georgia points. It is the anticipated grant of this authority which has prompted Johnson particularly and Deaton to support the Copperstate applications. The service Braswell would hereafter be able to offer in single-line between points west of El Paso, on the one hand, and those east of New Orleans, on the other, is a service which Copperstate would not be able to offer except through interchange over New Orleans.

Braswell contends that if the Copperstate applications are approved traffic it now handles between New Orleans

Baton Rouge, on the one hand, and, on the other, Los Angeles, Phoenix and El Paso and from New Orleans and Baton Rouge to Dallas, Fort Worth and Odessa would be subject to diversion.

Braswell's study of its service in the areas affected are for a period of six months from January through June of 1965. In that period it transported westbound from New Orleans and Baton Rouge 2,482 shipments to Los Angeles, Phoenix, Tucson and El Paso (62 percent of which moved to Los Angeles) weighing 4.6 million pounds and yielding revenues of $142,305; and in the reverse direction transported 7,860 shipments (with 97 percent of them from Los Angeles), weighing 3.9 million pounds and yielding revenues of $208,039.

In the same period Braswell transported 4,462 shipments from Baton Rouge and New Orleans westbound to its other Texas points of service weighing 7.78 million pounds and yielding revenues of $99,955. In the reverse direction eastbound it transported 17,805 shipments (including 17,016 from Dallas and Fort Worth, 26 from Odessa, 390 from Waco and 373 from Houston and San Antonio) weighing a total of 10.1 million pounds and yielding revenues of $70,544.

Braswell also handled some 1,800 shipments from New Orleans and Baton Rouge to Oklahoma City and Tulsa, Okla., and 2,060 shipments from those points to New Orleans and Baton Rouge, which in all yielded revenues of $114,232, but this traffic would move via Shreveport if over Braswell's direct routes and if solicited to move under the proposed operations by Copperstate (if these applications are granted) would need to move in joint-line service over Dallas and unless all of the England of Texas rights are acquired by Copperstate would move over circuitous routes so far as the Houston-Dallas leg is concerned. It is unlikely that this traffic would be subject to

diversion from Braswell to any proposed operation by Copperstate.

In operating west of Dallas Braswell moves its freight during the night through Mineral Wells, Abilene, Pecos, Big Springs and Odessa in both directions. Instead of accumulating enough ltl traffic to serve points intermediate between Odessa and Dallas it interchanges eastbound traffic moving to those points with Copperstate at Odessa and westbound traffic with Copperstate at Dallas. It serves these points itself when it has a truckload or volume shipment. This, of course, is a pooling practice which Braswell and other protestants ask the Commission to condemn as it applies to the practices of Strickland and England.

Red Ball in re the Copperstate Applications: Red Ball does not hold authority between Houston and New Orleans over a direct route. It operates between Houston and New Orleans via Shreveport and Alexandria and officers second morning service between Houston and New Orleans. It operates between Houston, on the one hand, and, on the other, points in Texas north thereof via Waco to Wichita Falls, via Palestine to Dallas and throughout eastern Texas north of Houston and Beaumont. It also operates between New Orleans and Baton Rouge, on the one hand, and, on the other, Dallas and points east and southeast thereof and is competitive on traffic moving from Houston or New Orleans to much of the Texas area just described.

In a two week period in June of 1965 Red Ball originated 12 shipments weighing 39,755 pounds at Beaumont moving to Louisiana points; 2,757 shipments weighing 3.6 million pounds at Houston moving to Louisiana and Arkansas points; 1,736 shipments weighing 883,680 pounds at points in the Dallas commercial zone and 82 shipments weighing 41,320 pounds at Amarillo all moving to Louisiana and

Florida points. In somewhat the reverse direction in those weeks it originated 819 shipments at New Orleans weighing 1.6 million pounds and 635 at Baton Rouge and its other Louisiana points weighing 2.8 million pounds all moving to Texas points. The total amount this traffic yielded is of record but the amounts Red Ball received from it are not of record.

On brief Copperstate contends that Red Ball's position in the Copperstate proceedings it ambiguous and its evidence relating to the movement of shipments without materiality because it fails to show where shipments were interlined, the proportion of Red Ball's revenue, and the specific traffic which might be diverted. Red Ball submitted this evidence in this manner contending that traffic it originates which Copperstate could solicit and originate following approval is the traffic which is vulnerable to diversion regardless of the point at which it may have been interlined by Red Ball or the amount of revenue yield.

The evidence submitted by Red Ball does show that it performs service in the same areas as authorized under the rights of England of Texas from Houston to Shreveport and to points in eastern Texas, and between New Orleans and points in Eastern Texas which Copperstate could provide (if all applications are approved) from New Orleans via Houston. If the rights of England of Texas from Houston to points in Texas other than Beaumont are canceled, Copperstate could neither offer competition to Red Ball from Houston nor single-line competition from New Orleans via Houston to Red Ball's authorized Texas points (other than to Dallas and Fort Worth but by operating circuitously over its existing regular routes). Red Ball would not be affected by the services Copperstate proposes between New Orleans and Baton Rouge, on the one hand, and, on the other, points on Copperstate routes in Texas and those west of El Paso.

Herrin and Ryder would be the most seriously affected protestants as a result of the approval of these applications, and to a lesser extent Braswell. Copperstate would become directly competitive on local traffic moving between Houston and the regular route points in Louisiana with both Herrin and Ryder but could not offer as complete a service as those carriers to all of the points in southern Louisiana. Their services have not at all times fulfilled all of the needs of the shipping public between Houston and such Louisiana points as Baton Rouge, New Iberia, New Orleans and points within 10 miles of New Orleans so that applicants have established that there is a continuing public need for some of the eastbound service Copperstate proposes most of which could be provided under the acquired rights alone. It also has shown that there is a need for a westbound service from New Orleans, Baton Rouge and New Iberia that entitles it to the regular route from Lake Charles to Houston and a redescription of the authority it would acquire from England from New Orleans to Lake Charles in terms of regular route authority. The total authority Copperstate would hold following approval would make it a more effective competitor to Braswell for transcontinental traffic but there is no reason shown why Braswell could not withstand this added competition.

In numerous proceedings under section 5 where the acquiring carrier is strong and greater competition could be afforded by it under the unified rights than under the separately held rights, protestant carriers are bound to face stronger competition and they are expected to adjust their operations to meet this added competition in the interest of allowing the public to receive the benefit of the unified operations. Protestants admit on brief that where ideal conditions exist the unification of two carriers having engaged in substantial interchange is not ob-

jectionable but argue that where two carriers who have not so interchanged seek to unify the resulting service would be new and detrimental to their operations. Here, however, applicants have shown that there is a public need for the unified service by expressions of such need from numerous representatives of the shipping public. Proof submitted for Copperstate to institute a new service through a grant of additional authority for westbound operations must be considered in the light of the overwhelming proof of a continuing need for the eastbound service. Because a definite need for the proposed eastbound service lesser proof for west bound service may be accepted to show a similar need when considered together Copperstate could thereby render a complete service which would benefit the public without seriously harming protesting carriers.

CONCLUSIONS RESPECTING THE STRICKLAND APPLICATIONS.

The evidence of applicants and protestants in Nos. MC-F-8798, and MC-59850 (Sub-No. 142), the requested findings of Strickland and protestants relating to the Strickland applications have been given careful consideration. Requested findings not specifically ruled upon herein either are not warranted or state arguments which have been given appropriate consideration elsewhere in the report.

In order that the operating authority Strickland will receive will conform as nearly as possible to the lawful operations England conducted individually and in combination with Strickland prior to their cessation, a number of conditions will be attached to the findings herein. First, upon consummation of the transaction a portion of the irregular-route rights which Strickland would acquire will be redefined in terms of regular-route authority with appropriate restrictions to limit service at the acquired and retained Louisiana points north of the line running along U. S. Highways 190, 165, 190 and 90 to traffic moving to,

from, or through, New Orleans and points within 10 miles of New Orleans. The redefinition will authorize operations over regular routes between New Orleans and Monroe via Alexandria over highways as set forth in Appendix L, serving Monroe, the intermediate points of Bunkie, Alexandria, and Ruston, and the off-route points of Tate Cove, England Air Force Base, Sterlington, and Bastrop, La., and points in their respective commercial zones restricted to traffic moving to, from, or through New Orleans, and points within 10 miles of New Orleans, and serving New Orleans, and intermediate and off-route points within 10 miles of New Orleans restricted to traffic moving to, from, or through, the above-named intermediate and off-route points. Second: Issuance of a certificate in No. MC-59680 (Sub-No. 142), will be conditionally authorized covering a regular route between New Orleans and Shreveport, La., serving Shreveport and points in its commercial zone restricted to traffic moving to, from, or through New Orleans and points within 10 miles of New Orleans, as set forth in Appendix M. Third: Upon consummation of the transaction and issuance of the certificate in the Sub-142 proceeding, the irregular-route authority not redefined in terms of regular-route authority and not converted to regular-route authority, will be canceled. And fourth: The authority emerging will be subject to the further condition that it shall not be combined or joined with any other authority of Strickland for the purpose of providing single-line service between points in the Memphis commercial zone, on the one hand, and, on the other, New Orleans and points within 10 miles of New Orleans.

The redescription of the acquired irregular-route operating authority without there being an application under section 207 on file to do so is on the authority of the findings in *Alabama Highway Express, Inc. Et Al.* v. *United States Et Al.*, 241 F. Supp. 290, decided May 21, 1965, affirming

the Commission's Decision and Order in *Deaton Truck Lines, Inc.—Purchase—Lavender,* 97 M. C. C. 256 (order entered August 7, 1964). The District Court's decision was affirmed by the United States Supreme Court in a per curiam decision in *Alabama Highway Express, Inc. Et Al.* v. *United States of America and Interstate Commerce Commission,* U. S. October Term 1965, No. 447, decided November 15, 1965. In *Lavender* (97 M. C. C. 256) the Commission redefined regular-route operating authority being acquired in terms of irregular routes on finding (1) that the point through which the acquired rights were to be unified with the vendee's existing rights was an off-route point removed by several miles of dirt and secondary highways and was in juxtaposition to a hardsurfaced highway over which the vendor had lawfully conducted operations to and from its regular route; and (2) that to remove any question of vendee's future operations in unifying the rights, the regular route rights were redescribed and redefined in terms of irregular route authority. The *Alabama Highway* decision represents the first court approval of the Commission's authority to condition approval under section 5 upon the acceptance by vendee of a certificate redescribed in irregular route terms in place of the regular route.

Subject to the modifications and restrictions to be placed on the operating rights to be acquired by Strickland in the finance proceeding and to be granted in the conversion proceeding, Strickland has fairly met its burden of showing that the proposed transaction would be consistent with the public interest, and that present and future public convenience and necessity require operation by it over a regular route between Shreveport and New Orleans. Fixed charges in the form of interest Strickland would incur would not be contrary to the public interest. The purchase price, while high, is not unreasonable when viewed in the

light of Strickland's ability to recoup it in a short period of time. The evidence does not show that any of the former employees of England would be adversely affected by approval and consummation of the Strickland-England transaction.

Approval of the transaction, a redescription and conversion to regular route authority of portions of the irregular route rights of England to be acquired, and the restriction to be placed on the rights as they would eventually vest in Strickland, would not affect adequacy of transportation service in the affected area but on the contrary would foster sound economic conditions in that area. The resulting operating authority which would be unified into Strickland with the present authority held by it would allow it to perform an economical service between areas between which it has for a number of years actually performed uneconomical service and would authorize without question of their future legality an all-highway operation no greater in scope than Strickland could perform itself circuitously or in combination with England or any other motor carrier operating between Shreveport and New Orleans willing to interchange traffic with it.

Should Strickland accept conditions to be imposed herein and receive authority to operate over the regular route sought between Shreveport and New Orleans and the redescribed authority between New Orleans and Monroe, it would obtain much less authority than held by England and would be afforded the direct route it seeks via the Shreveport gateway to avoid Houston but would appear to receive a windfall gateway via Monroe to give it an even more direct route to reach Memphis when the rights now under lease to Burks finally revert to Strickland. Such a gateway indeed would be a windfall as there has been no showing of a need for Strickland to unify the acquired rights with those leased to Burks to operate between New Orleans

and points on those leased routes, but likewise there is no reason now to believe that barring their outright acquisition by Burks they will not revert to Strickland. One protective condition to be imposed herein will prohibit Strickland from utilizing the emerging rights to transport traffic between points in the Memphis commercial zone, on the one hand, and, on the other, New Orleans and points within 10 miles thereof, and this will not be changed if the leased rights do revert to Strickland. Strickland would have a more direct route between St. Louis and New Orleans and perhaps could employ the deviation rules to shorten that route but would still be unable to serve Memphis.

Some of the motor carrier protestants operating between New Orleans and authorized points in the Mississippi River Valley and Chicago at times use piggyback substituted rail for motor service and it is expected that when Strickland acquires a reasonably direct route between New Orleans and St. Louis and Chicago it will seek to do likewise. Operations via the Monroe gateway and over the routes now leased to Burks would doubtless provide it with such a reasonably direct route if the Shreveport gateway alone does not. However, nothing herein should be construed as passing upon the legality of any future operations by Strickland employing substituted service.

CONCLUSIONS RESPECTING THE COPPERSTATE APPLICATIONS.

The evidence of applicants and protestants in Nos. MC-F-8808 and MC-22167 (Sub-No. 21), the arguments of applicants on brief, the motion to reconsider rulings admitting certain evidence of protestants unsupported by delivery receipts, the arguments of protestants on brief and their requested findings have all been given careful consideration. The motion for reconsideration is overruled. Requested findings not specifically ruled upon herein either

are not warranted or state arguments which have been given appropriate consideration elsewhere in the report. From the very complicated facts presented and the complex law applicable to these Copperstate applications, the following conclusions are warranted.

Applicants have shown that the operating rights of England were actively utilized to provide service between New Orleans, on the one hand, and, on the other, points in southern Louisiana on and south of the west to east line formed by U. S. Highways 190, 165, 190 and 90; that under a combination of their irregular-route rights England of Texas and England conducted motor-carrier operations from Houston to New Orleans and via New Orleans, to Baton Rouge, Ponchatoula, Hammond, Thibodaux and Plaquemine; that England itself engaged in operations from New Orleans to Lake Charles lawfully but from Baton Rouge to Lake Charles unlawfully by reason of the misinterpretation of its operating rights; that while England of Texas engaged in the transportation of ex water-borne traffic from Houston, much of which formed a part of the joint-line service it and England provided from Houston to New Orleans and Baton Rouge, England of Texas was not a competitive factor on traffic moving from Houston to other Texas points; that Copperstate has shown that acquisition of the vendors' operating rights would be consistent with the public interest subject to a number of conditions and restrictions, including redefinition of the emerging irregular-route rights in terms of regular-route authority; that in No. MC-22167 (Sub-No. 21), Copperstate has shown that public convenience and necessity require operation by it as a motor common carrier of general commodities, with certain exceptions, over a regular route from Lake Charles to Houston serving no intermediate points, and that in connection with a redescription of the acquired irregular-route rights public convenience and necessity require op-

eration by Copperstate to serve the intermediate point of Baton Rouge and the off-route point of New Iberia restricted, however, in no greater manner than the emerging regular route rights between New Orleans and Houston; that the emerging regular-route authority between New Orleans and Houston shall be as more fully described in Appendix N and shall be subject to the further restriction and condition that it shall not be combined or joined with the irregular-route authority Copperstate will acquire (also described in Appendix N) for the purpose of providing through service between points on such regular routes and points in Louisiana on and south of the line formed by U. S. Highways 190, 165, 190 and 90 other than Thibodaux, Ponchatoula, Hammond and Plaquemine; and that the total emerging rights shall be subject to a further restriction against the handling of traffic moving to, from, or through points in Louisiana north of the line formed by U. S. Highways 190, 165, 190 and 90.

The purposes and objectives to be achieved in the above findings are to allow Copperstate (by consummating the transaction and obtaining a partial grant of authority under the Sub-21 application) to perform a service between New Orleans and points within 10 miles of New Orleans, on the one hand, and, on the other, points in southern Louisiana; to provide a regular-route service between Houston and New Orleans serving Beaumont for the delivery of eastbound traffic and serving Lake Charles, New Iberia, Baton Rouge and points within 10 miles of New Orleans unrestricted on traffic moving to or from or through New Orleans or Houston but restricted against traffic moving between other southern Louisiana points covered by the irregular-route rights (other than Thibodaux, Plaquemine, Ponchatoula and Hammond), on the one hand, and, on the other, Houston; and to prohibit Copperstate from interchanging traffic with Strickland (or the

holder of the remainder of England's Louisiana rights) at New Orleans which could not lawfully be moved to, from, or through points north of the line in question under a combination of the rights of England alone. In short, Copperstate would emerge with the irregular route rights of England covered by the transaction, with a regular route between Houston and New Orleans serving Lake Charles, New Iberia, Baton Rouge and points within 10 miles of New Orleans for the purpose of handling traffic moving east of Louisiana and/or west of Louisiana, but could not combine the irregular-route rights and the regular-route rights to perform a through service nor handle traffic moving from and to points north of the line used to divide the England rights.

Subject to the several conditions to be imposed, the Copperstate transaction has been shown to be consistent with the public interest and public convenience and necessity has been shown to require the operations to be authorized. The fixed charges Copperstate would incur in the form of interest in paying the balance of the purchase price would not be contrary to the public interest. Copperstate has absorbed those employees of vendors desiring employment with it so that carrier employees would not be adversely affected by approval of the transaction.

It is not clear whether issuance of the notes by Strickland and Copperstate to finance their transactions require prior approval under section 214, or whether even upon their issuance the total securities each would have outstanding would still be below the exemption of $1,000,000 provided in section 214. If not, nothing herein shall be construed as permitting consummation of the respective transactions unless appropriate authority is obtained under section 214.

It is the sense of the findings herein that the purchase prices may be adjusted downward if the parties so desire

without obtaining further approval of the Commission, although in no sense are they required to be adjusted downward.

In view of the division of the England rights and the conditions imposed to avoid an enlargement of the authority for which public convenience and necessity has not been proven, both transactions and subject to all of the terms and conditions imposed herein shall be consummated simultaneously, and one may not be consummated unless both are consummated.

The accounting to record the transactions on the books of the respective vendees will not be approved at this time, but will be reserved for consideration upon submission of the statement for that purpose as required by the orders herein.

ULTIMATE FINDINGS AND ORDERS.

In No. MC-F-8798, the examiner finds that the purchase by Strickland Transportation Co. Inc., of the previously-described portions of the operating rights of England Transportation Co., Inc. (a Louisiana corporation), and acquisition by L. R. Strickland of control of the operating rights through the purchase, upon the modified terms and conditions above set forth, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5(2)(a) and will be consistent with the public interest, and if the transaction is consummated and a certificate as sought in No. MC-59680 (Sub-No. 142) is granted to Strickland Transportation Co. Inc., it will be entitled to operate under that portion of the operating rights granted in No. MC-57946 (Sub-No. 3) as redescribed in Appendix K, with duplications eliminated; *provided, however,* that if the said certificate is issued in No. MC-59680 (Sub-No. 142), and the transactions approved herein and in No. MC-F-8808 are consummated, concurrently therewith those portions of the operating rights of England Transportation Co. Inc. (a Louisiana corporation), granted in No. MC-57946 (Sub-Nos. 2 and 3) to be acquired herein by Strickland Transportation Co. Inc., which are not set forth in Appendix K shall be canceled, and those set forth in Appendix K as unified in Strickland Transportation Co. Inc., shall not be combined or joined with any other authority presently held by Strickland Transportation Co. Inc., for the purpose of providing single-line service on traffic moving between (including traffic moving from, to, or through) points in the Memphis, Tenn., commercial zone as defined by the Commission, on the one hand, and, on the other, New Orleans, La., and points within 10 miles of New Orleans.

In No. MC-59680 (Sub-No. 142), the examiner finds that in connection with the transaction authorized in No. MC-

F-8798, the present and future public convenience and necessity require operation by Strickland Transportation Co. Inc., as a common carrier by motor vehicle, in interstate or foreign commerce, of the commodities, between Shreveport and New Orleans, La., over the regular route and subject to the further terms and conditions as set forth in Appendix L, and subject to the condition that the authority granted hereby shall not be combined or joined with any other authority presently held or to be acquired herein by Strickland Transportation Co. Inc., for the purpose of providing single-line service on traffic moving between (including traffic moving from, to or through) points in the Memphis, Tenn., commercial zone as defined by the Commission, on the one hand, and, on the other, New Orleans, La., and points within 10 miles of New Orleans; that Strickland Transportation Co. Inc., is fit, willing, and able properly to perform the said operations; that upon consummation of the transaction authorized in No. MC-F-8798 and upon compliance with sections 215, 217, and 221(c) and rules, regulations and requirements prescribed thereunder, Strickland Transportation Co. Inc., will be entitled to a certificate of public convenience and necessity authorizing operations as set forth in Appendix L hereof, and that, except to the extent granted herein the application in No. MC-59860 (Sub-No. 142) should be denied.

In No. MC-F-8808, the examiner finds:

(1) That the purchase by Consolidated Copperstate Lines of the operating rights of England Transportation Company of Texas, and the previously-described portions of the operating rights and property of England Transportation Co. Inc. (a Louisiana corporation), and acquisition by Horace W. Steele, Service Tank Lines, Cornel G. Allen and Walber B. Allen of control of the operating rights and property through the purchase, upon the modi-

fied terms and conditions above set forth, which modified terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5(2)(a) and will be consistent with the public interest, and if the transaction is consummated and a certificate sought in MC-22167 (Sub-No. 21) is granted to Consolidated Copperstate Lines, it will be entitled to operate under the retained portions of the operating rights granted in No. MC-2960 (Sub-No. 1), and under those portions of the irregular-route operating rights granted in No. MC-57946 (Sub-Nos. 2 and 3), as described in Appendix N and as redescribed therein in part in terms of regular route authority, *provided, however,* that if the said certificate is issued in No. MC-22167 (Sub-No. 21), and the transactions approved herein and in No. MC-F-8798 are consummated, the operating rights acquired in the transaction herein and those granted in No. MC-22167 (Sub-No. 21) shall not be combined or joined for the purpose of providing single-line service on traffic moving between (including traffic moving from, to, or through) Houston, on the one hand, and, on the other, points in Louisiana other than Lake Charles, New Iberia, Baton Rouge, Ponchatoula, Hammond, Thibodaux, Plaquemine and New Orleans and points within 10 miles of New Orleans, and service at these authorized Louisiana points restricted against traffic moving to, from, or through points north of a line beginning at the Texas-Louisiana State line and extending along U. S. Highway 90 to junction U. S. Highway 165 near Iowa, La., thence along U. S. Highway 165 to Kinder, La., thence along U. S. Highway 190 to junction U. S. Highway 90 four miles east of the Louisiana-Mississippi State line, and thence along U. S. Highway 90 to that State line; and *provided, further,* that if the transaction is consummated, and coincidentally therewith, those portions of the operating rights of England Transportation Company of Texas not included in Appendix N shall be canceled.

(2) That in No. MC-22167 (Sub-No. 21), public convenience and necessity require operation by Consolidated Copperstate Lines as a motor common carrier in interstate or foreign commerce of general commodities, with exceptions as shown in Appendix N, over a regular route from Lake Charles, La., to Houston, Tex., over Interstate Highway 10, serving no intermediate points, and in connection with the transaction authorized in No. MC-F-8808 and in the redescription of the authority acquired therein, to serve the intermediate point of New Iberia, subject, however, to the further conditions as more fully set forth in Appendix N.

In view of the findings in Nos. MC-F-8798 and MC-59680 (Sub-No. 142), it is the order of the examiner that the purchase by Strickland Transportation Co. Inc., of certain of the operating rights of England Transportation Co. Inc. (a Louisiana corporation), and acquisition by L. R. Strickland of control of the said operating rights through the purchase, be, and they are hereby, approved and authorized, subject to the terms and conditions set forth above.

Except to the extent granted in the findings herein, the application in No. MC-59860 (Sub-No. 142), be, and it is hereby, denied.

The authority granted in No. MC-F-8798 shall not be exercised and the authority granted in No. MC-59860 (Sub-No. 142) shall not be effective prior to the date of service of an order adopting this order as the order of the Commission or of a notice stating that this recommended order has become the order of the Commission, and then shall not be exercised unless the authority granted in No. MC-F-8808 is also exercised.

If the parties to the transaction authorized in No. MC-F-8798 desire to consummate same they shall (1) promptly take such steps as will insure compliance with sections 215, 217, and 221(c) of the Interstate Commerce Act, and

with rules, regulations, and requirements prescribed thereunder, and (2) confirm in writing immediately thereafter the date on which consummation has actually taken place.

Unless the authority granted herein is exercised within 90 days from the effective date of such adopting order or notice this order shall be of no further force and effect.

Effective with consummation of the transaction or 90 days from the effective date hereof, whichever first occurs, the authority granted in the first ordering paragraph of the order entered September 30, 1964, in No. MC-F-8798 as amended February 5, 1965 and February 15, 1965, authorizing the operation of the considered operating rights of England Transportation Co. Inc. (a Louisiana corporation), shall be of no further force and effect.

If the authority granted herein is exercised Strickland Transportation Co. Inc., shall submit for consideration a sworn statement and one copy thereof, showing all expenditures made, by dates, or to be made, in connection with the transaction authorized, including the consideration, legal and other fees, commissions, witness fees, and any other costs incidental to the transaction, the assets acquired and liabilities assumed, indicating the account number and title to which each item has been or is to be debited or credited.

The recital herein of balance sheet and other financial data shall not be construed as approving accounting methods which have been followed or expenditures represented thereby.

By the Commission, Elden J. Miller, Hearing Examiner.

Dated at Washington, D. C., this 29th day of April, A. D. 1966.

H. NEIL GARSON,
Secretary.

(SEAL)

In view of the findings in Nos. MC-F-8808 and MC-22167 (Sub-No. 21) herein, it is the order of the examiner that:

In No. MC-F-8808, the purchase by Consolidated Copperstate Lines of the operatng rights of England Transportation Company of Texas and the operating rights and property of England Transportation Co. Inc. (a Louisiana corporation), and acquisition by Horace W. Steele, Service Tank Lines, Cornel G. Allen and Walter B. Allen of control of the said operating rights and property through the purchase, be, and they are hereby, approved and authorized, subject to the terms and conditions set forth above.

Except to the extent granted in the findings herein, the application in No. MC-22167 (Sub-No. 21), be, and it is hereby, denied.

The authority granted in No. MC-F-8808 shall not be exercised and the authority granted in No. MC-22167 (Sub-No. 21) shall not be effective prior to the date of service of an order adopting this order as the order of the Commission or of a notice stating that this recommended order has become the order of the Commission, and then shall not be exercised unless the authority granted in No. MC-F-8798 is also exercised.

If the parties to the transaction authorized in No. MC-F-8808 desire to consummate same they shall (1) promptly take such steps as will insure compliance with sections 215, 217, and 221(c) of the Interstate Commerce Act, and with rules, regulations, and requirements prescribed thereunder, and (2) confirm in writing immediately thereafter the date on which consummation has actually taken place.

Unless the authority granted herein is exercised within 90 days from the effective date of such adopting order or notice this order shall be of no further force and effect.

Effective with consummation of the transaction or 90 days from the effective date hereof, whichever first occurs, the authority granted in the first ordering paragraph of

the order entered September 30, 1964 in No. MC-F-8808 as amended February 15, 1965, authorizing the lease of portions of the operating rights of England Transportation Co. Inc. (a Louisiana corporation), and England Transportation Company of Texas, shall be of no further force and effect.

If the authority herein granted is exercised Consolidated Copperstate Lines shall submit for consideration a sworn statement and one copy thereof, showing all expenditures made, by dates, or to be made, in connection with the transaction authorized, including the consideration, legal and other fees, commissions, witness fees, and any other costs incidental to the transaction, the assets acquired and the liabilities assumed, indicating the account number and title to which each item has been or is to be debited or credited.

The recital herein of balance sheet and other financial data shall not be construed as approving accounting methods which have been followed or expenditures represented thereby.

By the Commission, Elden J. Miller, Hearing Examiner.

Dated at Washington, D. C., this 29th day of April, A. D. 1966.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX A.

No. MC-59680 (Sub-No. 142)

STRICKLAND TRANSPORTATION CO. INC., EXTENSION—
NEW ORLEANS

The following is the authority sought in the above-numbered proceeding.

General commodities, except household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M. C. C. 467, classes A and B explosives, commodities in bulk, and commodities requiring special equipment over a regular route:

Between New Orleans, La., and Shreveport, La., serving all points within 10 miles of New Orleans as off-route points, and restricted against traffic originating at, or destined to points more than 10 miles from New Orleans corporate limits and on U. S. Highway 61 on or south of junction U. S. Highway 190:

From New Orleans over U. S. Highway 61 to junction U. S. Highway 190 at Baton Rouge, thence over U. S. Highway 190 to junction U. S. Highway 71, thence over U. S. Highway 71 via Alexandria to Shreveport and return over the same route.

APPENDIX B.

No. MC-22167 (Sub-No. 21)

CONSOLIDATED COPPERSTATE LINES EXTENSION—
NEW ORLEANS

The following is the authority sought in the above-entitled proceeding.

General commodities, except classes A and B explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M. C. C. 467, commodities in bulk, and commodities requiring special equipment, over regular routes:

Between New Orleans, La., and Houston, Tex., serving all intermediate points, as follows:

From New Orleans over Interstate Highway 10 to Baton Rouge, La. (also from New Orleans over U. S. Highway 61 to Baton Rouge), thence over U. S. Highway 190 to Kinder, La., thence over U. S. Highway 165 to junction U. S. Highway 90 near Iowa, La., and thence over U. S. Highway 90 via Lake Charles, La., to Houston, Tex. (also from the Louisiana-Texas State line over Interstate Highway 10 to Houston),

From New Orleans over Interstate Highway 10 via Baton Rouge, Lafayette and Lake Charles, La., and Orange and Beaumont, Tex., to Houston, and

From New Orleans over U. S. Highway 90 via Houma, Morgan City, Jenerette, New Iberia, Lafayette, Crowley, Jennings, Iowa and Lake Charles, La., and Orange, Tex., to junction Interstate Highway 10, and thence to Houston as specified above, and

Return over these routes to New Orleans.

APPENDIX C-1.

August 10, 1961

M-789272

Docket MC-57946 Subs 2 & 3

Mr. Joseph L. Waitz
O'Neal & Waitz
Attorneys at Law
Houma, Louisiana

Dear Sir:

This responds to your letter of August 2, 1961, addressed to the attention of the Secretary of the Commission, concerning the authority of England Transportation Company, Inc., in MC 57946 Subs 2 and 3.

In answer to your first inquiry, it is my informal opinion that under authority in MC 57946 Sub 3, covering between New Orleans, La., and points within 10 miles of the corporate limits of New Orleans, on the one hand, and, on the other, points in Louisiana, with exceptions not here pertinent, the carrier may interchange traffic at Lake Charles, La., and transport such interchanged freight to New Orleans. It is my further informal opinion that it is not necessary that such interchanged freight be destined exclusively for consignees at New Orleans, but that it may be interchanged there with other carriers for delivery to destinations other than New Orleans, such as the Baton Rouge destination cited in your letter as an example. It is possible for England to itself perform the further transportation from New Orleans to Baton Rouge or other points it is authorized to serve on traffic from New Orleans by combining the authority contained in its certificate MC 57946 Sub 2 with that in the Sub 3 certificate. Such shipments, of course, must be transported through a point in the New Orleans commercial zone.

In response to your further request, I am enclosing a copy of the certificate issued to Consolidated Companies, Inc., in MC 79913, which certificate was acquired by England Transportation Company, Inc., and is now embraced in its certificate No. MC 57946 Sub 2.

Very truly yours,

HERBERT QUALLS,
Director.

Enclosure.

cc: District Director English
Interstate Commerce Commission
816 T. & P. Bldg.
Fort Worth 2, Texas

DLR/glc

APPENDIX C-2.

February 1, 1963

M-918236
Docket MC-57946 Sub 3

Mr. Joseph L. Waitz
O'Neal & Waitz
Attorneys at Law
Houma, Louisiana

Dear Sir:

This responds to your letter of January 23, 1963, your file 11,327-1-8, concerning the authority held by England Transportation Company, Inc., MC 57946 Subs 2 and 3.

As you were informed in a letter dated August 10, 1961, this carrier holds authority in certificate No. MC-57946 Sub 3 under which it may transport authorized commodities from Lake Charles, La., to New Orleans. It may use for this purpose any highways which offered a reasonably direct or logical route between the points thus authorized to be served. However, once it has transported a shipment between such authorized points under the said authority, it may not transport the same shipment from New Orleans to Houma or Lafayette, since this would constitute a prohibited cross-haul under the decision in *Aetna*, 48 M. C. C. 610, and others.

Accordingly, in my informal opinion the subject carrier may not perform the subject transportation specifically described in your letter; viz from Lake Charles, La., to New Orleans, and thence to Houma and Lafayette.

Very truly yours,

GEO. A. NEYER,
Assistant Director,

cc: District Director English
Interstate Commerce Commission
816 T. & P. Bldg.
Fort Worth 2, Texas.

DLR/glc

APPENDIX C-3.

April 7, 1964

M-996053

Docket MC-57946 Sub 2

Mr. Joseph L. Waitz
O'Neal & Waitz
O'Neal Building
Houma, Louisiana

Dear Sir:

England Transportation Company, Inc., referred to in your letter of March 16, 1964, has authority in MC 57946 Sub 2 to transport general commodities with stated exceptions "from New Orleans and Plaquemine, La., to Baton Rouge and Thibodaux, La." In MC 57946 Sub 3 the carrier has authority to transport general commodities with stated exceptions "between New Orleans, La., and points and places within ten miles of the corporate limits of New Orleans, on the one hand, and, on the other, points and places in Louisiana, except from New Orleans to Amite, Baton Rouge, Clinton, Hammond, Kentwood, Ponchatoula, and Thibodaux, La., and between New Orleans and Plaquemine."

The Commission has held that where a common carrier has separate and unrestricted authorities which have a common point of service to which a given shipment may be transported under one authority and from which the same shipment may be transported under the other the carrier may furnish through service on the shipment under a combination of the authorities provided the shipment is transported through the common point of service.

It is my informal opinion that under the Sub 3 authority quoted above the carrier may pick up a shipment of authorized commodities at Shreveport from either a connecting carrier or a shipper and transport the shipment to New Orleans or a point in its commercial zone and then under

the Sub 2 authority transport it from New Orleans or a point in its commercial zone to Baton Rouge. It may not transport shipments from Shreveport to Houma, Lafayette, New Iberia, Lake Charles or Opelousas as such transportation would constitute a prohibited cross-haul between points in the so-called radial territory of the radial authority in Sub 3. Compare *Jack Cole*, 32 M. C. C. 199.

It is my further informal opinion that the carrier may not pick up shipments at Lafayette, Franklin and Baton Rouge and transport them through New Orleans for delivery at Lake Charles and Shreveport for interchange or otherwise. Such transportation also would constitute a prohibited cross-haul between points in the so-called radial territory of the Sub 3 authority.

So far as can be determined the carrier has no authority under which it may perform any of the service mentioned by you except from Shreveport to Baton Rouge under a combination of the two authorities as stated.

The opinions expressed are not binding on the Commission or interested parties. If a decision by the Commission is desired or necessary a formal proceeding should be instituted for that purpose.

Very truly yours,

HERBERT QUALLS,
Director.

cc: District Director McAndrew
316 T. & P. Bldg.
Fort Worth, Texas 76102

APPENDIX D.

Analysis of handling by England from or to New Orleans of 206 shipments listed in "Strickland" Exhibit B-7

	INTERSTATE						INTRASTATE	
	INBOUND TO			OUTBOUND FROM			FROM & TO	
Points in Commercial Zones of:	Origin Area	Shipments No.	Shipments Weights	Destinations	Shipments No.	Shipments Weights	No.	Weights
Alexandria	North[1]	33	6,231	North[3]	1	40		
	South[2]	8	826	South[4]	5	1,614		
	Total	41	7,057	Total	6	1,654	3	1,489
Bastrop	North	—	—					
	South	2	1,305					
	Total	3	1,305					
Monroe	North	55	13,271	North	5	2,062		
	South	23	11,099	South	10	7,496		
	Total	78	24,370	Total	15	9,558	3	8,647
Ruston	North	1	475					
Shreveport	North	20	5,032					
	South	5	456					
	Total	25	5,488				3	656
Sterlington				All Points	15	472,778		
Tate Cove				All Points	5	165,556		
Bunkie	North	1	92					
Jackson							1	47
Jonesboro	South	1	117					
Rayville	South	2	121					
St. Francisville	South	1	55	All Points	2	75,430		
Walker	North	1	25					
TOTALS		154	39,105		43	724,976	9	10,839

1. "Origin area—North" means that these shipments had an out-of-state origin north or northeast of Louisiana.

2. "Origin area—South" means that these shipments were received by England from carriers coming into New Orleans from the south and include shipments having origins in the north as well as the south.

3. "Destination area—North" means destinations were north or northeast of Louisiana.

4. "Destination area—South" means destinations were in the south.

APPENDIX E.

Analysis of handling by England from or to New Orleans of 1,934 shipments listed in Exhibits 18-23

Points in Commercial Zones of:	INTERSTATE						INTRASTATE	
	INBOUND TO			OUTBOUND FROM			TO OR FROM	
	Origin Area	No. of Shipments	Weights	Destination Area	No. of Shipments	Weights	Shipments	Weights
Alexandria	North[1]	342	87,985	North[3]	8	1,680		
	South[2]	37	8,504	South[4]	48	26,109		
	Total	379	96,489	Total	56	27,789	43	31,890
Bastrop	North	5	322	North	—	—		
	South	34	28,346	South	11	369,107		
	Total	39	28,668	Total	11	369,107	—	—
Monroe	North	498	139,521	North	55	16,191		
	South	324	464,062	South	132	279,681		
	Total	822	593,583	Total	187	295,872	20	56,410
Ruston	North	2	322	North	—	—		
	South	18	21,514	South	—	—		
	Total	20	21,836	Total	—	—		
Shreveport	North	50	21,916	North	—	—		
	South	126	45,878	South	—	—		
	Total	176	67,794	Total	—	—	18	5,186
Sterlington	South	3	3,492	All Points	125	3,257,624		
Tate Cove		—	—	All Points	21	714,748		
Bunkie	North	1	116					
Deville	North		75					
Downsville	South	1	1,305					
Farmersville	South	1	136					
Greenwell Springs	South	1	1,189					
Hodge	South	1	465					
Minden	South	1	1,000					
New Roads	North	1	10,030					
Pineville	North	1	116				2	260
Tioga	South	1	28,000					
Winnfield							1	29,290
Leesville							1	70
TOTALS		1,449	854,294		400	4,665,140	85	123,106

1. "Origin area—North" means that these shipments had an out-of-state origin north or northeast of Louisiana.

2. "Origin area—South" means that these shipments were received by England from carriers coming into New Orleans from the south and include shipments having origins in the north as well as the south.

3. "Destination area—North" means destinations were north or northeast of Louisiana.

4. "Destination area—South" means destinations were in the south.

APPENDIX F.

Findings of Fact and Conclusions Requested by Strickland.

1. England has actively conducted operations as authorized in the authority sought to be transferred to Strickland in consonance with its financial resources, ability, facilities, its operating authority and the territory served.
2. Approval of the applications will permit continuance in single-line service of the service which has been provided as joint-line service of England and Strickland between Shreveport and New Orleans, La.
3. Approval of the application will not prejudice nor materially affect the ability of existing carriers to conduct their operations.
4. The purchase price is not unreasonable.
5. The proposed division of the operating rights of England in this transaction is not grotesque or unreasonable and is along clear cut geographical lines and permissible.
6. The evidence requires a finding that vendee is fit, willing and able to operate over the rights proposed to be acquired.
7. The proposed transaction is consistent with the public interest and should be approved.
8. The operations of England and the temporary operations of Strickland have achieved, by public demand and use, the character of regular route operations over the described route between New Orleans and Shreveport.
9. The operations of Strickland over the New Orleans-Shreveport route will be those of a regular route carrier and this segment of the authority should be converted, with appropriate restrictions.

APPENDIX G.

Analysis of handling by England from or to New Orleans of interstate shipments on 14 days as listed in Exhibit 81.

Points in Louisiana	From New Orleans to the following points		To New Orleans from the following points	
	No. of Shipments	Weight	No. of Shipments	Weight
Baton Rouge	886	938,691	30	277,945
Port Allen	1	52	35	1,040,827
Plaquemine	14	3,680	9	214,239
Lutcher	2	2,262		
Gonzales	3	399	20	30,337
Gramercy	4	720	2	71,650
Reserve	5	3,490	2	74,535
Norco	3	608		
Good Hope	1	40,160	38	120,986
Covington	1	11,902		
Welsh	1	60		
LaPlace	4	2,942		
Houma	12	50,147		
Thibodaux	4	949		
Morgan City	10	2,170		
Berwick	1	213		
Franklin	3	19,088		
New Iberia	16	4,988		
Jenerette	2	232		
Breaux Bridge	3	245		
Lafayette	72	15,644		
Opelousas	5	1,147		
Rayne	6	1,207		
Crowley	8	2,084		
Jennings	1	362		
Lake Charles	9	1,401		
Venice	19	5,739		
Empire	1	120		
St. Gabriel	1	1,785		
Kaplan	3	514		
Eunice	2	186		
Point a la Hache	1	2,340		
Port Sulphur	6	2,066		
Broussard	1	382		
Weeks Island	1	100		
TOTALS	1,158	1,118,075	136	1,830,519

APPENDIX H.

Analysis of shipper and receiver evidence supporting Copperstate application MC-22167 (Sub-No. 21), for westbound service from such points in Louisiana as Baton Rouge, New Orleans and other points on the requested regular routes in Louisiana to Houston and beyond:

1. A manufacturer of household insecticides ships these products from its warehouse at Baton Rouge to San Antonio, El Paso and points in Arizona and California. It ships insecticides in truckload quantities and has shipped 300,000 pounds via Copperstate in a 7-month period to its San Antonio warehouse. It has previously used the joint-line service of Herrin and Copperstate, Ryder or Red Ball in connection with other carriers for westbound service. It discontinued using Ryder on traffic moving to San Antonio because Ryder did not furnish equipment on time for picking up when called. Herrin at times does not have equipment available. This shipper also has shipped ltl shipments from Baton Rouge via Copperstate to San Francisco to meet ship sailings. It would use Copperstate from Baton Rouge to San Antonio and west thereof because it contends there is no single-line service available to it. Braswell has not served this shipper. Herrin for the most part has been a reliable and dependable carrier in serving this shipper. A motion to strike the testimony of this shipper's representative on the ground that Copperstate is not authorized to perform a single-line service from Baton Rouge to San Antonio or points west under temporary authority was overruled. However, Copperstate is without authority to perform the first leg of the haul from Baton Rouge to Lake Charles for this shipper under temporary authority as will be seen from the extended discussion which follows and from the findings in

the report proper. (Cook Chemical Company. Tr. pg. 1156).

2. A wholesale distributor of hardware, plumbing supplies and heating and air conditioning equipment receives "plumbing china" shipments once a month at its warehouses in Lubbock, Midland, and Brownwood, Tex., from New Orleans. It anticipates that its business will grow. It has used the services of Copperstate in other directions and would use it from New Orleans if Copperstate obtains the requested authority. The record does not show the volume of traffic which this shipper has shipped or would ship to the Texas points mentioned. (Weakley-Watson. Tr. pg. 1239).

3. A dealer in printing and lithographing equipment and supplies located at San Antonio has used the service of Copperstate from New Orleans to San Antonio at the rate of one shipment a week in the transportation of type rollers which require protection from heat and moisture. Each of 10 shipments Copperstate handled for it weighed between 100 and 1,500 pounds. The service of Copperstate has been without difficulty or claims of any kind. This shipper would continue to use Copperstate so long as it is authorized to make deliveries at San Antonio. (Texas Type Foundry, Incorporated. Tr. pg. 1243).

4. A manufacturer of hollow metal doors and pressed steel frames, located at New Orleans, which commodities are used in public buildings, hospitals and schools, has manufacturer's agents at Houston, Dallas and Fort Worth, and commission agents in Arizona. Its commodities are sold on the basis of the lowest bid. At the time of the hearing it had orders for 3,100 pounds of its products to be shipped to Phoenix, 1,200 pounds to Tempe, Ariz., 2,700 pounds to Kerrville, Tex., and 2,600 pounds to Brownwood, all to be given to Copperstate "on a trial basis to see how we fare out via Copperstate". It nevertheless supports the

Copperstate application for single-line service. Its products could be shipped to any point in Texas or Arizona. It has had other shipments to Arizona to which it has used the single-line services of Braswell and Red Ball. (American Metal Works. Tr. pg. 1543).

5. A manufacturer and distributor of dragline and clamshell buckets, grapples, tanks and other metal products, located at Baton Rouge, ships its products to Houston, Arizona points, Oakland, San Francisco, Seattle and Salt Lake City. Its shipments range in size from 900 pounds to 45,000 pounds each. It began to utilize the service of Copperstate shortly after temporary authority was exercised. It has shipped 4 to 5 shipments weighing over 100,000 pounds to the West Coast which Copperstate has transported from Baton Rouge even though it is without authority to originate traffic at Baton Rouge and transport it from that point to Lake Charles or beyond. In order for Copperstate to serve this shipper under temporary authority as the originating and delivering carrier it would be required to take its traffic from Baton Rouge to New Orleans, there interchange it with a carrier for transportation to Houston or some other Copperstate point under its permanent rights where Copperstate could receive it back and transport it west thereof to destination. Unless the regular-route requested in Sub 21 is granted to Copperstate it could not lawfully originate such traffic and move it in single-line service via Houston to the West Coast. This is one of just two shippers supporting the application for westbound service from Baton Rouge. Other carriers it has used on westbound freight have been Ryder, Herrin, Braswell and Red Ball to Texas, Arizona, and California points. It has used the service of Braswell to Texas points without difficulty, but did encouter difficulty on a shipment originated by Braswell moving to Oakland over El Paso and that difficulty was that Braswell could not furnish trac-

ing information. This shipper has had difficulty in getting Herrin to make pickups at or after 3:30 p.m. when its shipments are available as on one occasion Herrin's truck did not arrive until a second call was made after which Herrin sent a special truck. One of the commodities this shipper has tendered to Herrin has been clamshell or dragline buckets used in the oilfield industry. Herrin refused to accept them because when its equipment arrived the paint on the buckets was still wet. Yet the shipper expected Herrin to accept them. This shipper also has had traffic destined to Houston routed by the consignee to be moved by Red Ball. Red Ball on three occasions in a year failed to make pickups promptly. On one occasion it failed to make a pickup on the day requested. This shipper no longer uses Ryder because Ryder's representative stated that it provides a second or third morning delivery from Baton Rouge to Houston. Braswell's records show that it transported 12 shipments for this shipper from June 1964 to June 1965, which were destined to El Paso, Redding, Calif., Bellingham, Wash., Port Hueneme, Calif., Phoenix, Ariz., Auburn, Utah, Jackson, Miss., and Miami, Ariz. (Yaun Manufacturing Company. Tr. pg. 1674).

6. A manufacturer of showcases made of wood, glass, aluminum, plastic and steel and used to display radios, phonographs, televisions and housewares ships its products from New Orleans. Its products are manufactured on a mass production basis for nationally known appliance dealers and shipped knocked down in carton weighing from 325 to 350 pounds each with glass components separately boxed and weighing 53 pounds each. The cartons and boxes are shipped together from New Orleans to Houston, San Antonio, Dallas, Amarillo, points in Arizona, California and Oregon. This shipper has used the service of Copperstate from New Orleans to California points on two trial shipments in December of 1964 and January of 1965 and

on the basis of the service Copperstate rendered it shipped 33 shipments by Copperstate from February to May of 1965 with 16 going to California, 1 to Portland, Oreg., and 1 each to Houston, San Antonio, Dallas and Amarillo. It desires the single-line service of Copperstate because of the fragile nature of its merchandise, the ease of tracing shipments, and the establishment of responsibility when damage occurs. This shipper has used the service of Braswell and has found it satisfactory except that in one instance a shipment was delayed beyond the time it considered it should take to effect delivery. Its uses Braswell to other destinations and on inbound traffic and has had fine service from it except to California. Herrin has originated traffic for this shipper at New Orleans destined to California but its customers in California will no longer accept shipments delivered by the carrier which eventually obtained such shipments from Herrin and therefore it may no longer tender shipments to Herrin. (Displays, Incorporated. Tr. pg. 1721).

7. A hardware company located at San Angelo receives rope, wire, sleeping bags, fishnet and earthenware from New Orleans in shipments weighing 500 pounds each at the rate of one a week. It is now specifying Copperstate for inbound service. In a period of 7 months from June of 1964 to January, 1965, when it would have received 30 or so shipments from New Orleans, this hardware company was able to show that the two-line service of Strickland to Houston and Merchants to San Angelo was provided in 3 days on 2 shipments; that Strickland and Texas-Arizona provided two-line service over Houston in 5 days on 1 shipment with a week-end intervening and 6 days on another with New Year's Day followed by a week-end intervening. It was able also to show that the two-line service of Herrin and Merchants over Dallas was 5 days on 3 separate shipments with week-ends intervening in all three. This hard-

ware company, which is not open at all on Saturdays, expects to receive consistent two-day service from Copperstate if the applications are granted. (Findlater Hardware Company. Tr. pg. 1772.)

8. A manufacturer of canned and bottled foodstuffs, with a packing plant and distribution center at New Iberia, ships 150,000 pounds of its products a week from New Iberia to points in Texas, New Mexico, Arizona, California, Oregon and Utah utilizing its own equipment (6 units) for deliveries to as far away as California (returning with other canned goods) for 80 percent of its outbound traffic; utilizing rail service to Texas, California and Oregon; and utilizing motor carriers for just 5 percent of its outbound traffic from New Iberia. It does use Herrin from New Iberia to Dallas and Fort Worth for a 36,000-pound truckload once every two weeks. The support of this shipper is to obtain the single-line service of Copperstate from New Iberia to Texas and west of El Paso so that it may discontinue its private carriage. Its policy is not to utilize joint-line service even though two motor carriers would offer a through trailer service. It has been offered the through trailer service of Herrin and Western-Gillette but has refused to utilize it. It regards the joint-line service of Consolidated Copperstate in conjunction with Valley Motor Lines as a single-line service. It also believes that if it discontinues its operations as a private carrier it would utilize other for-hire carriers such as on inbound freight from two tomato canning plants in eastern Texas which plants Copperstate would not be authorized to serve. (Bruce's Food Corporation. Tr. pg. 1959.)

9. An ice cream company and an affiliated food service supply company of Odessa receives flavoring, syrups, fruits, toppings, canned goods and cocoa powder from suppliers located in New Orleans. Since November, 1964 it has used the services of Copperstate almost exclusively at

the rate of 3 to 4 times each month for shipments ranging in weight from 1,500 to 3,000 pounds each. It has used the services of Texas and Pacific Railroad in conjunction with Merchants. It is expected that the food service company, which is fairly new, will increase its business if it obtains second-morning service from New Orleans to Odessa which it believes Copperstate will provide. If Braswell could provide such a service it would have no objection to such a service. (Otto's Ice Cream Company. Tr. pg. 1982.)

10. A retail shoe store in Lubbock has used the services of Copperstate exclusively from New Orleans to its store in Lubbock since November, 1964, receiving 20 to 25 cases of shoes a week, each case ranging in weight from 20 to 40 pounds and its volume amounting to from 400 to 800 pounds a week. This retail shoe store generally orders a particular shoe style at buyers market. Since it has been able to obtain a second-morning service from New Orleans to Lubbock it ordered particular shoes as fill-ins of shoes on hand. (Lubbock Self-Service Shoes. Tr. pg. 2005.)

11. A dealer in foreign sports cars located at Abilene receives parts for such cars from New Orleans at the rate of 2 to 3 shipments a month ranging in weight from 50 to 400 pounds each. It has specified Copperstate since the first of 1965, has received excellent service from it and would continue to specify Copperstate if its authority were to be made permanent. (Village Motors. Tr. pg. 2075.)

12. A dealer at Odessa catering to corrosion prevention and in pipeline supplies receives paint and epoxy coatings used for corrosion prevention on tanks used in oilfields from Belle Chasse (a point within 10 miles of New Orleans) commencing in September, 1964. In an 8-month period it received 17,000 pounds of these commodities in shipments ranging in weight from 400 to 4,000 pounds each. Between January and May of 1965 it has received the services of Copperstate on 6 or 7 such shipments. Copperstate has

represented to this shipper a second-morning delivery from Belle Chasse to Odessa which would enable it to reduce inventory. This consignee would continue to use Copperstate if its authority is made permanent. (Ace Specialties, Incorporated. Tr. pgs. 2111 & 2157.)

13. A nonregulated freight forwarder of household goods and customs broker with headquarters in Houston, utilizes the motor carrier services of Copperstate for the transportation of shipments of crated household goods of military personnel from Copperstate's Texas points through Houston to New Orleans when, as the shipper, it pays the transportation charges. In February, 1965, during a port strike at Houston, Copperstate transported 7 truckloads of such shipments for it weighing a total of 110,000 pounds. At New Orleans this firm consolidates inbound ltl shipments of such household goods, clears them through customs there, crates them and ships them to Texas points or beyond. It utilizes Copperstate from New Orleans for these crated shipments. In May of 1965, it used Copperstate for four such shipments for movement via Houston to points beyond. (Ellis Forwarding Company. Tr. pg. 2330.)

14. A bakery specializing in Duncan Hines fruit cakes, ships these products in ltl quantities in shipments weighing from 150 to 300 pounds and in truckloads weighing 20,000 pounds each. It supports the Sub 21 application for single-line service from its plant in Arabi, La. (located in the New Orleans commercial zone), to or through Houston. It began the manufacture of the Duncan Hines fruit cakes in October of 1964 so that year was its first experience in shipping from Arabi to the West Coast and points intermediate thereto. At first it used Gordons as the origin carrier to Dallas and other carriers beyond. In November of 1964 it began to use Copperstate as the origin carrier and is aware of the interline service Copperstate is re-

quired to use from Lake Charles to Houston. It would continue to use this service or if the Sub 21 application is granted the single-line service Copperstate would provide thereafter. It desires a service in which Copperstate would start a truckload at Arabi and make drop off shipments en route to California. It also desires its single-line service as far as Oregon. (Carver Foods Company. Tr. pg. 2545.)

15. A company in San Francisco engaged in the redemption of S & H Green Stamps for merchandise receives some of such merchandise from New Orleans and has used the single-line service to Copperstate since November of 1964 from New Orleans to San Francisco. (Sperry-Hutchinson Company. Tr. pg. 3097.)

APPENDIX I.

Analysis of shipper and receiver evidence supporting Copperstate application in MC-22167 (Sub-No. 21) for eastbound service from Houston and points west thereof directly to Baton Rouge and other points in southern Louisiana located on the requested routes even though they also ship to Lake Charles, New Orleans and points within 10 miles of New Orleans:

1. A manufacturer of surgical sutures and operating room supplies with a $5 million plant located underground at San Angelo which ships perhaps 150 shipments a year weighing 91 pounds each to Baton Rouge and New Orleans, supports the single-line service proposed by Copperstate and prefers it to existing joint-line services. It had used the services of Herrin and Red Ball over the Dallas gateway in connection with a nonprotesting originating carrier, and received complaints in connection with this joint-line service. None of the carriers protesting these applications is authorized to originate traffic at San Angelo. Copperstate would be able to provide a completely satisfactory service for this shipper. (Ethicon, Inc. Tr. pg. 1097.)

2. A distributor of valuable and delicate musical instruments and accessories which are shipped from San Antonio to Baton Rouge, New Orleans, Lafayette, Thibodaux, some 60 other points in Louisiana, and to points east of Louisiana, has had difficulties in utilizing joint-line service over Houston to these Louisiana points. It had resorted to using intercity bus service but this requires that each shipment must be reduced in size so as not to exceed $200 in value. Since using Copperstate under temporary authority it has received no complaints. It would use Copperstate service weekly to New Orleans for traffic moving east thereof. (C. Bruno and Son, Incorporated. Tr. pg. 1126.)

3. A manufacturer of candles and candle holders which ships its products from San Antonio to Baton Rouge and New Orleans and beyond Louisiana has up to 2 shipments a week weighing 200 pounds each to New Orleans and Baton Rouge. It has found the single-line service of Copperstate satisfactory. It has used the joint-line service of a nonprotesting carrier and Herrin over the Houston gateway but has had difficulty in tracing shipments. (Reed Candle Company. Tr. pg. 1174.)

4. A manufacturer of heating and air conditioning equipment distributes its products from a warehouse in San Antonio to Lake Charles, Baton Rouge and New Orleans. It ships from 500 to 2,000 pounds daily to those points, with Baton Rouge receiving 4 shipments a week ranging in weight from 500 to 1,000 pounds each. It has used the single-line services of Strickland and Braswell and the joint-line services of Central and Herrin, and other joint-line services. It has discontinued using Strickland and other carriers and now uses Copperstate exclusively. It has had complaints when using joint-line services but none since using Copperstate single-line service. (Day and Night Mfg. Co. and The Payne Company. Tr. pg. 1189.)

5. A dealer in floor tile, among other things, with warehouses in New Orleans and Baton Rouge supports the application to receive service from Copperstate on tile originating at Houston and moving in truckload quantities to such warehouses or to job sites in New Orleans or Baton Rouge. It would receive 1 truckload a week on the average as it received 20 truckloads between January and May of 1965. One of this company's problems is related to the problems of the tile installers. When a large installer places an order with the dealer (the supporting receiver) the order may specify the job site where the tile is to be delivered and the hour in the beginning of the work day when it should be delivered. If the installer has

unloaders hired to unload the tile at the job site and the tile is late in arriving the installer is required to pay wages to persons while awaiting the arrival of the truck. Prior to the 1st of February 1965 this did happen as an installer was required to pay extra wages when the shipment was brought to a job site in Gretna, La. (within the New Orleans commercial zone), by Herrin after the unloaders had reported for work. Beginning in June of 1964, when the dealer began to receive tile from the Houston supplier, it used Red Ball via Shreveport and then Herrin which handled 18 truckloads to its warehouse and 4 to job sites of which 2 to job sites were not satisfactory. Herrin service otherwise has generally been satisfactory. Since February of 1965 Copperstate has served the dealer and so far as the record shows has done so without complaint. Copperstate transported 15 truckloads for this dealer between February and May of 1965 with 3 going directly to job sites in Gretna. The tile dealer also has received single-line service from Strickland to New Orleans, and has received the single-line service of Ryder from Houston to Abbeville, La., which Copperstate is not authorized to serve under temporary authority in single-line service from Houston. (New Orleans Sash and Door Company, Tr. pg. 1549; Roubion Tile and Marble Company, Tr. pg. 1563).

6. A distributor of industrial supplies, pipe valves and fittings, which are sold to plants, contractors and construction firms either directly or through its Baton Rouge store, supports the Copperstate applications. Its principal source of supply is Houston, but it recently became a distributor for a manufacturer located at Long Beach and Emeryville, Calif. It complains that Herrin makes deliveries of ltl shipments in Baton Rouge between 12 noon and 2 p.m. which it regards as too late to fill orders that day. It also complains that it is able to get deliveries

on Saturdays only when Herrin has a load of freight outbound from Baton Rouge because without it the inbound driver would either lay over in Baton Rouge until Monday or return to Houston empty. Besides Herrin, Ryder, Rose, Strickland and Red Ball have delivered shipments to this distributor in Baton Rouge. It has not yet used the service of Copperstate under temporary authority because it was represented that such service from Houston to Baton Rouge would require 2 days and it desires overnight service. Rose makes deliveries from Emeryville, Calif., to Baton Rouge for it every other day. This consignee also receives shipments from Beaumont but Copperstate has failed to show in this record in what manner it would serve consignors in Beaumont. (Louisiana Supply Company. Tr. pg. 1631).

7. A manufacturer and distributor of well drilling tools with plants at Midland, Tex., and Morgan City, La., and a warehouse at Houston, has interplant movements of its finished and unfinished products between Midland and Morgan City at the rate of 2 to 3 times a month in shipments ranging in weight from 100 to 500 pounds each. It has used the service of J. H. Rose Truck Lines, Inc., a so-called oilfield hauler, but is unable to get prompt economical service on small emergency shipments, having to pay for the exclusive use of a vehicle at the rate of 16 cents per mile. Copperstate is unable to serve Morgan City in direct service from Midland under temporary authority, but has offered to provide a second-morning service from Midland to Morgan City if these applications are granted, and if they are, this shipper would divert traffic from Rose and give it to Copperstate. (Drilco Oil Tools, Incorporated. Tr. pg. 1751).

8. A manufacturer and distributor at Odessa of asbestos cement pipe fittings, some of which are received in the first instance from Marrero (located in the New Orleans

commercial zone), then fabricated at Odessa and along with other similar or related products shipped again. It has shipped from 3 to 10 shipments weekly ranging in weight from 100 to 7,000 pounds each from Odessa to Lake Charles, Sulphur, Baton Rouge and New Orleans. The commodities it receives from the Johns Manville plant at Marrero are heavy wall pipe of odd sizes shipped in ltl quantities. For its inbound transportation needs it has received the single-line piggyback service of the T&P Motor Transport Company, the joint-line services of Ryder or Strickland as originating carriers and Copperstate or Merchants as delivering carriers. This shipper has never used the available single-line service of Braswell between Odessa and Marrero, first because its principal owner who is president and general manager and who handles its shipping, did not know Braswell had such service available, and second, because it believes that Braswell was the cause of its losing four jobs because a shipment of 7 barrels of cast iron flanges weighing between 800 and 900 pounds per barrel originating at Hutchinson, Kans., and routed via Braswell from Oklahoma City took 11 days to reach Odessa when 2-day service was held out. He further contends that the shipment reached Oklahoma City the day after it left Hutchinson and that this took place in January of 1965. Braswell shows that it transported 5 shipments for this consignee from Oklahoma City to Odessa which were originated at Hutchinson weighing 1,400 pounds, 1,560 pounds, 625 pounds, 1,135 pounds, and 515 pounds, respectively, and moving in the months of March, September, November and December of 1964, and in each instance the service Braswell rendered from Oklahoma City to Odessa was 2 days except when the shipment was moved by Braswell from Friday to Monday. However, none of these shipments is identified as consisting of 7 barrels of cast iron flanges weighing a total of 5,600 to 6,300 pounds as testified

to by the shipper's witness. This would mean that as to the 5 shipments Braswell did perform an on-time service but as to the larger shipment an unusual delay occurred causing the shipper to be unwilling to specify its service thereafter. (Corrosion-Proof Fitting Company. Tr. pg. 1866).

9. The sales and service outlet of a manufacturer of internal combustion engines, located at Abilene, ships engine heads to New Iberia which is classed as a rebuilding point, where they are rebuilt and returned to Abilene. This shipper is now using the joint-line service of Copperstate and carriers serving New Iberia (Saia being one) at the rate of 2 or 3 times a week of shipments ranging in weights from 150 to 250 pounds each. Copperstate has held out to give second morning single-line service whereas the present joint-line service of Copperstate and another carrier is third morning. This shipper has used Ryder from New Iberia to Houston and Merchants to Abilene and in a four and one-half month period in which it would receive perhaps 60 shipments it received 6-day service with respect to one. (Waukesha Sales and Service, Incorporated. Tr. pg. 1931).

10. Copperstate represents on brief that a manufacturer of valves used in water, gas, oil or steam pipelines has need of Copperstate's service from its warehouse located in Houston to Lake Charles, Baton Rouge, New Orleans and a number of other southern Louisiana points located on U. S. Highway 90 and has complaints against Ryder and Herrin for failure to make prompt pickups. However, the volume it would ship in any period, the total weight it has shipped in any period, and the specific points to which it has had shipments are not shown. Moreover, half of the shipments are routed by its customers and many are under 100 pounds and are shipped by bus. At best this shipper would make a minimal use of Copperstate's service to

Louisiana points. (Lunkenheimer Valve Company. Tr. pg. 2266).

11. An automobile parts dealer located in Houston ships automobile parts (from engines to radios) to points in southern Louisiana and used Copperstate for 10 shipments to Baton Rouge and New Orleans. It uses the services of Herrin and Ryder to other southern Louisiana points. No problems or complaints were voiced by this shipper respecting its transportation needs. (Southern Star Parts Corporation. Tr. pg. 2286).

12. A manufacturer's representative who has a warehouse in Houston who represents more than 8 manufacturers of electrical supplies, who warehouses their supplies as well as supplies of other such manufacturers, the stock of all having a value of $250,000, supports the applications. He had utilized the service of Copperstate for a period of 6 or 7 months at the rate of about 11,000 pounds a month to Baton Rouge, New Orleans and Lake Charles. He has had difficulty in using the service of Herrin having had numerous complaints concerning it. While he also receives traffic from a similar manufacturer's representative located at New Orleans and from a Florida supplier, his transportation needs for inbound service to Houston were not detailed for the record. (Arling D. Smith. Tr. pg. 2386).

13. A manufacturer which at Houston manufactures reproduction papers which are damaged when exposed to light or moisture, ships these papers in ltl quantities to New Orleans, Baton Rouge, Lake Charles and Lafayette. It has used the services of Copperstate for several months to New Orleans and Baton Rouge. Its shipments range in weights from 10 to 3,000 pounds each. It ships 60,00 pounds to these Louisiana points in a 6-month period, with 80 percent going to Baton Rouge and New Orleans at the rate of 3 or 4 shipments a week. Over a period of 12 months it

would ship 15 shipments to Lafayette, 30 to Lake Charles, 24 to Baton Rouge, and 100 to New Orleans. Its shipments to New Orleans are critical in point of time because it is in competition with a manufacturer of the same kind of papers located in New Orleans and prompt delivery of its products is a prime aspect of its meeting competition. Service to Baton Rouge, Lake Charles and Lafayette does not require the same expedited deliveries. Copperstate has provided overnight service to New Orleans and has held out second day service to Baton Rouge but this shipper rarely has a critical shipment to Baton Rouge. It has discontinued using Ryder to New Orleans and uses Herrin only on customers' routings to Baton Rouge. It complains that Herrin does not pick up promptly. It is using the services of Ryder and Red Ball to Lake Charles and Lafayette and does not again require the same prompt delivery to those points as to New Orleans. (Frederick Post Company. Tr. pg. 2423).

14. A manufacturer of rotary drill bits ranging in weights from 25 to 500 pounds each, ships these bits from Houston to New Orleans and other southern Louisiana points near to where well rigs are operating, including New Iberia, Morgan City, Houma, Harvey, Eunice, Lake Charles and Baton Rouge. It has not used the services of Copperstate to any Louisiana points. It does use the services of irregular-route carriers transporting oilfield commodities and Greyhound and Trailways buses. It has shipments requiring overnight service and deliveries between 8 and 9 a.m. to meet drill crews. Occasionally it uses so-called hot shot service being the exclusive use of a truck at 16 cents per mile for a round trip. It has not used the services of Ryder because of its failure to make pickup on the day requested and has not used Herrin in 5 years. Copperstate has promised to provide it with pickup as late at 7 p.m. and a next early morning delivery. If such a

service were made available this shipper would discontinue using irregular-route carriers, buses and the hot shot service. The volume of freight it would ship and the frequency were not shown in this record. (Hughes Tool Company. Tr. pg. 2434.)

15. A wholesaler of office supplies and equipment located at Houston ships about 1 million pounds of freight a year to Lake Charles, Baton Rouge, New Orleans and Lafayette in shipments ranging in weight from 50 to 2,000 pounds each. It used the joint-line service of vendors from Houston to these Louisiana points for two years prior to their cessation of operations. It now uses the services of Copperstate to the same points with Lafayette traffic routed to New Orleans for interchange. It uses the services of Ryder and Herrin but complains that they do not make pickups on time, Herrin coming after 5 p.m. It would continue to use Copperstate to the Louisiana points mentioned though Copperstate would be required to interchange Lafayette traffic at New Orleans. It does not show that it requires a direct service (over the regular route sought) from Houston to Lafayette nor the amounts of traffic moving to the several points mentioned. (Stationers Distributing Company. Tr. pg. 2455.)

16. A Houston printing company engaged in the printing of telephone directories, magazine inserts and general printing, ships its products to Lake Charles, Baton Rouge, New Orleans and Houma in ltl quantities at the rate of from 8 to 10 shipments a week ranging in weights from 200 to 800 pounds each. It anticipates that it will print the New Orleans Telephone Directory in 1966 which might weigh in all 2.5 to 3 million pounds and of which 30 percent would be shipped to New Orleans in ltl quantities. Aside from the telephone directories, it ships from 30 to 40 shipments a year to New Orleans, a third of which Copperstate would handle and the rest divided among Herrin, Ryder

and Strickland; 10 to 15 to Lake Charles divided among Copperstate, Herrin and Ryder; 20 to Baton Rouge with one-half to Copperstate and the rest to Herrin and Ryder; and 20 to Houma with 8 or so to Copperstate and the rest to Herrin and Ryder. Its shipments to Houma do not require expedited handling. It does not give reasons for wanting the proposed single-line service from Houston to Houma or Baton Rouge. (Gulf Printing Company. Tr. pg. 2472.)

17. A manufacturer's representative selling electrical equipment including steel boxes, control cabinets, bare wire and guy strands, ships these commodities from Houston to Lake Charles, New Orleans and points beyond New Orleans at the rate of 50,000 pounds in a year in ltl quantities with a majority destined to New Orleans and some going to Baton Rouge. Its shipments range in weights from 500 to 10,000 pounds each. It has expressed no need for direct service to other southern Louisiana points. It would have perhaps 180 shipments to New Orleans of which Strickland would transport over 160 and Copperstate about 18; and would have 120 shipments to Lake Charles which would move via Strickland, Herrin, and Southern Pacific. (Fred Walters Company. Tr. pg. 2493.)

18. A manufacturer and fabricator of industrial plastics, including teflon packings, gaskets and seals, ships about 5,000 pounds of its products from Houston to New Orleans and Baton Rouge and other points in Louisiana to points east thereof. (Ethylene Gulf Coast Corporation. Tr. pg. 2507.)

19. A manufacturer of bulk handling equipment, including pneumatic conveying equipment used in baking, food processing, coffee and chemical industries, ships about 50,000 pounds of its products a year from Houston to Baton Rouge and New Orleans in ltl and truckload quantities. Its ltl shipments average 500 pounds each. Its ma-

chinery is fragile and bulky. It uses the services of several so-called heavy haulers. Its traffic requires open-top or flat-bed equipment. It has tendered ltl shipments to such carriers as Herrin and Ryder and since December, 1964 has utilized Copperstate for ltl service to both Baton Rouge and New Orleans. It has had difficulty getting Ryder or Herrin at times to send open-top equipment for its ltl shipments on the same day an order is placed for it even though the order is placed as late as 4 p.m. Copperstate has provided it with open-top equipment for picking up the 20 or so shipments it has transported for it between December of 1964 and May of 1965. This shipper also uses the services of Strickland but gave no comment respecting any difficulties with that carrier. Both Herrin and Ryder own, operate and have available open-top and flat-bed equipment suitable for this shipper's needs. (Systems Engineering and Manufacturing Company. Tr. pg. 2556.)

20. A Houston manufacturer of man made marble which is used for laboratory counters, table tops and fireplaces, in the first 6 months of 1965 shipped 20,000 pounds of its products from Houston to Baton Rouge and Metairie (located in the New Orleans commercial zone), at the rate of 25 shipments a month weighing an average of 400 pounds each. It has used Herrin and Red Ball in single-line service and Mercury and a connecting line in joint-line service. It has received late pickups from Red Ball and Herrin. Its commodities are fragile and require care in handling. (Venetian Marble Company. Tr. pg. 2575.)

21. A manufacturer of chemicals ships from its warehouse in Houston to its warehouses in Lake Charles, Baton Rouge, Plaquemine and New Orleans. It uses its equipment (3 units) for transporting its truckload shipments but uses for-hire carriers for ltl shipments. They range in weight from 50 to 9,000 pounds each and average 400 to 500 pounds each. This shipper began using Copperstate

from Houston in April of 1965, giving it shipments to Lake Charles, Plaquemine and New Orleans even though the Plaquemine shipment was interchanged at Baton Rouge. It quit using Ryder because when it was using Ryder pickups were made as late as 6:30 or 7 p.m. when it closed at 5 p.m. Now it stays open until 6:30 and Copperstate will pick up as late as that time. Herrin recently missed a pickup of a shipment of 10 drums weighing 4,000 pounds in all. Herrin was called on a Wednesday and after three calls picked the shipment up on that Friday. This shipper would continue to give its ltl traffic moving to its Louisiana warehouses mentioned to Copperstate if its authority is made permanent. (McKesson & Robbins. Tr. pg. 2586.)

22. A pump and valve manufacturer and steel fabricator has shipped its products from Portland, Oreg., via Copperstate for a period of six months prior to the hearing to Lake Charles, Baton Rouge, New Orleans and Chalmette, La. Prior to using Copperstate it used three nonprotesting motor carriers as originating carriers. It believes there is a continuing need for Copperstate's service to the Louisiana points. It also has traffic moving to Lafayette. (Guy F. Atkinson Company. Tr. pg. 2645.)

23. A Portland, Oreg., manufacturer of specially designed paper bags and gift wrappings, which are shipped to Beaumont, Tex., New Orleans, Houma and Lafayette, has used the service of Copperstate for a period of six months. Prior to using Copperstate it used two nonprotesting motor carriers as the originating carriers. It would use Copperstate's service in the future even though it has not heretofore routed traffic via the Los Angeles gateway which was moving to Louisiana. (Packwell Paper Industries. Tr. pg. 2671.)

24. A firm dealing in infant garments ships these commodities from Lake Oswego, Oreg., to points in southern Louisiana including New Orleans, Baton Rouge, Houma

and New Iberia, has tendered to Copperstate shipments moving to those points. Prior to this it used the service of two nonprotesting originating motor carriers and a freight forwarder to New Orleans but encountered difficulties in tracing its shipments. (J. V. Brand, Inc. Tr. pg. 2747.)

25. A manufacturer of industrial marine and automotive oil filters located at Alhambra, Calif., has used the services of Copperstate over a 6-month period for the transportation of 76 shipments weighing 40,000 pounds to Harvey, La., located in the New Orleans commercial zone. It also ships its products to Beaumont, Lake Charles, Morgan City and Houma at the direction of its dealer in Harvey. Prior to using Copperstate to Harvey it had used the services of a nonprotesting motor carrier to the southern Louisiana points but received complaints. (Rolpak. Tr. pg. 2764.)

26. A manufacturer of outdoor electrical fixtures and garden lights located at Burbank, Calif., has had shipments of its products moving from Burbank to Beaumont, Lake Charles, New Orleans, Marrero, Arabi, Abbeville, Morgan City, Houma and points beyond Louisiana. In a 6-month period it tendered 20 to 25 shipments to Copperstate moving to Lake Charles, Morgan City, Marrero and Houma weighing up to 500 pounds each but Copperstate's handling of the Morgan City and Houma shipments was not detailed for the record. In a year's time from June, 1964 to June, 1965, it tendered Braswell 7 shipments weighing a total of 1,345 pounds which moved to Beaumont, New Orleans, Arabi and Abbeville, La., and Bay St. Louis and Biloxi, Miss. Its only complaint against Braswell is that Braswell picks up between 12 noon and 1 p.m. which is too early for its rush shipments. (Shalda Light Products Company. Tr. pg. 2773.)

27. A manufacturer of decorative products such as bi-

fold doors, wooden panels and wall panelling, located at Azusa, Calif., 20 miles east of Los Angeles, has for 6 or 8 months prior to the hearing shipped its products via Copperstate to Lake Charles, New Orleans and Lafayette and would continue to ship them via Copperstate to these three points if the applications are approved. (Gulek O. Bolok Company. Tr. pg. 2833).

28. A manufacturer of vertical filing equipment has shipped blueprint filing equipment from its plant in Torrance (located in the Los Angeles area) via Copperstate service since November 1964 at the rate of 4,000 pounds a month to Baton Rouge and New Orleans, respectively, 3,200 pounds a month to Lafayette, and 200 pounds a month to New Iberia. It has used Copperstate as the originating carrier to New Orleans on traffic moving to points east of Louisiana with monthly averages ranging from 900 pounds to Georgia points to 4,000 pounds to Florida points. When it began using Copperstate to Louisiana points and to the New Orleans gateway it discontinued using Braswell and a nonprotesting motor carrier on similar traffic. It would use the Copperstate service for its Louisiana traffic and as the originating carrier for traffic moving east of Louisiana if Copperstate's applications are granted. (Plan Hold Corporation. Tr. pg. 2847).

29. A Los Angeles manufacturer of stainless steel fittings used by refineries, dairies and others users of its products ships a small volume to Baton Rouge and has used Copperstate service on about 6 shipments between January and June of 1965. In the year ending June 1965, Braswell transported 4 shipments for this shipper weighing 1,116 pounds to Baton Rouge and New Orleans. (Sun Weld Fitting Company, Tr. pg. 2924).

30. A manufacturer of residential and commercial heating equipment of Buena Park, 22 miles east of Los Angeles Civic Center, ships its large shipments via rail to a New

Orleans distributor and its ltl shipments via motor carrier to Lake Charles and Baton Rouge. It used the Copperstate-Ryder joint-line service prior to December of 1964, but since uses Copperstate in single-line service to Lake Charles and Baton Rouge. (Williams Furnace Company. Tr. pg. 2941).

31. A Los Angeles manufacturer of electronic power supplies, automotive charging and testing equipment and industrial supplies on January 26, 1965, began to use the single-line service of Copperstate to Baton Rouge and New Orleans and in four and one-half months thereafter shipped 5 shipments weighing a total of 1,000 pounds to Baton Rouge, 8 weighing 15,000 pounds destined to New Orleans and about 25 to New Orleans for movement beyond. It has used the service of Western Gillette and two non-protesting motor carriers as originating carriers in joint-line service. (Christie Electric Corporation. Tr. pg. 3037).

32. A San Francisco manufacturer of steel wire rope and other wire products used in the logging, marine and oil industries, which has a contract to supply its products to a customer located in Baton Rouge, has used the single-line service of Copperstate beginning in February of 1965 and believes there is a need for its service on a permanent basis. (E. H. Edwards Company. Tr. pg. 3057).

33. A manufacturer of tubing located at Los Angeles has used Copperstate since November of 1964, in the transportation of 30 of its shipments weighing from minimum to 2,000 pounds each from Los Angeles to Baton Rouge. Braswell transported 10 shipments for this shipper from Los Angeles to New Orleans weighing 2,236 pounds in a period of a year from June 1964 to June 1965. (Kilsby Tube Supply Company. Tr. pg. 3090).

34. A nationally known manufacturer of chemicals ships chemicals and plastics from its plants in Fresno and Pittsburg, Calif. It makes 1 to 2 shipments a month of empty

stainless steel cylinders weighing 200 pounds per shipment to Lake Charles; and it made 1 shipment in a 6-month period weighing 60 pounds to Houma. It also makes shipments to New Orleans for export. In a 6-month period it had made 3 shipments from Fresno to Baton Rouge weighing a total of 635 pounds. It has used the service of Copperstate for the shipments indicated and supports the application for a single-line service to all of the points named. (Dow Chemical Company. Tr. pg. 3094).

35. A national distributor of imported diesel engines which are imported through Long Beach, Calif., and shipped from Compton, Calif., to Houma and Harvey, La., and to a number of points in Florida, began using the services of Copperstate in May of 1964 on this traffic in conjunction with another carrier and in November of 1964 began to use Copperstate in single-line service to Harvey for deliveries and to New Orleans for movement into Florida. And apparently it uses Copperstate on traffic destined to Houma on some joint-line basis. Its shipments to Harvey and Houma average 2 to 3 a month and weigh from 600 to 800 pounds each. Its shipments to Florida average 15 a month and weigh 1,200 pounds each. (Continental Machine Corporation. Tr. pg. 3115).

36. A nationally known manufacturer of electrical appliances has shipped transformers, motors, controller parts and related products at the rate of 20,000 pounds a month via Copperstate from Imperial, Calif., to Lake Charles, Baton Rouge and New Orleans, one-half of which moved to points east of Louisiana. (Westinghouse. Tr. pg. 3148).

37. A pottery manufacturer of Scottsdale, Ariz., in a period of just over two months in 1965 shipped 66 shipments via Copperstate weighing 24,000 pounds to Louisiana points and 10 shipments to points east of Louisiana weighing 3,482 pounds. The 66 shipments were destined to Lake Charles, Baton Rouge, Lafayette, Jennings, St. Francis-

ville, Reserve and Jenerette. (LaSolana Pottery. Tr. pg. 3149).

38. A Phoenix manufacturer of figurines, images and ornaments, shipped 6 shipments of its products via Copperstate to Baton Rouge and Lake Charles weighing 800 pounds. (Century Gift Manufacturers, Inc., Tr. pg. 3151).

39. A Gardena, Calif., manufacturer of plastic dishes beginning in February 1965 shipped 19 shipments of its products weighing 6,673 pounds to Lake Charles, Baton Rouge, points in the New Orleans commercial zone and Morgan City via Copperstate. In the year ending June 1965, Braswell transported 17 shipments for this shipper from Gardena weighing 7,287 pounds which were destined to Bogalousa, Hammond, Lake Charles, Metairie, New Orleans, Baton Rouge, Lafayette, New Iberia and Denhan Springs, La. Neither carrier is authorized to perform single-line service to all of the Louisiana points named. (Blisscraft. Tr. pg. 3154).

40. A manufacturer of valves and valve parts located at Long Beach, Calif., since January of 1965 has shipped via Copperstate an average of 15,000 to 20,000 pounds of its products a month of which 65 percent moved to Baton Rouge and New Orleans and 35 percent to New Orleans for destinations east of Louisiana. In the year ending June 1965, Braswell transported a single shipment for this shipper weighing 38 pounds which moved to Pascagoula, Miss., but had transported none in that time to Louisiana points. (General Valve Company, Inc. Tr. pg. 3155).

41. A Los Angeles concern dealing in tubing made of wrought iron, steel or aluminum, has used the service of Copperstate beginning in early 1965 for the transportation of 10 shipments to Baton Rouge weighing 575 pounds and 8 to New Orleans weighing 3,208 pounds. It also has used Copperstate in the transportation of 6 shipments weighing 1,929 pounds moving westbound from Baton Rouge to its establishment in Los Angeles and 1 from New Orleans to

Los Angeles weighing 104 pounds. In the year ended in June 1965, Braswell transported 102 shipments for this shipper weighing a total of 29,556 pounds which moved to New Orleans, Harvey, Baton Rouge, Michaud, Lafayette, Houma, Bogalousa, Morgan City, Gramercy, Jenerette, Jefferson Island, Welch and Norwood, La., and to 5 points in Mississippi, but again the record does not show the handling of these shipments to the points Braswell does not serve direct. (Tube Sales. Tr. pg. 3157).

42. A Los Angeles manufacturer of iron and steel valves began using Copperstate in November of 1964 to Louisiana points and up to June of 1965 had shipped 7 shipments weighing 6,135 pounds destined to Houma and Bogalousa and 4 weighing 5,418 pounds to Harvey. (Daniel Orifice Fitting Company. Tr. pg. 3158).

43. A manufacturer of automobile parts including tail pipes shipped in bundles and cartons, located at Gardena, ships these commodities at the rate of 5,000 pounds each week to New Orleans and Baton Rouge 3 days a week and 3,000 pounds in 2 weeks to points east of New Orleans having shipments almost every day to those points, and began using Copperstate's service to the Louisiana points and the New Orleans gateway in February 1965. In the year ending in June 1965, Braswell transported 15 shipments for this shipper weighing 6,859 pounds from Gardena to Baton Rouge and New Orleans. (Fenton Company. Tr. pg. 3159).

44. A manufacturer of wallpaper, which is shipped from Los Angeles, used the service of Copperstate beginning in April 1965 for 4 shipments ranging in weights from 32 to 944 pounds each to New Orleans, for an undisclosed number of shipments to Lafayette on April 8, 1965, and for perhaps 10 shipments weighing 1,351 pounds (134 pounds each) to the New Orleans gateway for destinations east of Louisiana. In the year ending in June 1965, Braswell transported a shipment for this shipper weighing 38 pounds and destined to Lake Charles. Again the record does not show where

Copperstate gave up the Lafayette shipment or where Braswell gave up the Lake Charles shipment. (Albert Van Luit Company. Tr. pg. 3161).

45. A Long Beach manufacturer of cleaning compounds and coatings beginning in January 1965, has used the services of Copperstate in the transportation of 2 ltl shipments a week weighing approximately 1,000 pounds for movement to Baton Rouge and New Orleans, and an undisclosed number of shipments, their weights or frequence of service, for 8 or so destinations east of Louisiana. (Sparks Chemical Company. Tr. pg. 3163).

46. A shipper of metal products located at Los Angeles, between December of 1964 and May of 1965, used Copperstate for the transportation of 1 shipment destined to Baton Rouge weighing 150 pounds, 1 to Lafayette weighing 248 pounds, 5 destined to New Orleans weighing 2,402 pounds, and several to New Orleans destined to points east of Louisiana. (Chase Metals Tr. pg. 3168).

47. A manufacturer of metal hose, aluminum pipe fittings, furnace sheet steel, roofing flashings and assemblies for chimneys, located at Los Angeles, between February 5, 1965 and April 30, 1965, used the service of Copperstate in the transportation of 1 shipment to Lake Charles weighing 597 pounds, 2 shipments to Baton Rouge weighing 333 pounds, 9 shipments destined to New Orleans weighing 1,639 pounds, and 9 shipments to New Orleans destined to 6 Florida points weighing 4,500 pounds. In the year ended in June 1965, Braswell transported 1 shipment for this shipper to New Orleans weighing 184 pounds. (American Metal Products. Tr. pg. 3169).

48. A manufacturer of plumbers brass goods and gate valves, located at Los Angeles, between November of 1964 and June of 1965, used Copperstate for the transportation of 21 of its shipments destined to New Orleans and 5 destined to Baton Rouge together weighing 15,112 pounds, and 14 to the New Orleans gateway which were destined to a

single point in Mississippi and which weighed 130,000 pounds. (Price-Fister Corporation. Tr. pg. 3171).

49. A Los Angeles manufacturer of girls' and teenagers' coats has used Copperstate for more than a year prior to temporary authority (October 1964) for the transportation of its products to Lake Charles, Opelousas, Baton Rouge and New Orleans and in 1964 Copperstate transported shipments totalling 8,000 pounds for this shipper moving to the points named. In the year ending in June 1965, Braswell transported 18 shipments for this shipper moving to Beaumont, Baton Rouge, New Orleans, Eunice and Houma weighing 2,920 pounds. (Little California Coat Company. Tr. pg. 3174).

50. A Torrance, Calif., manufacturer of earthenware, in the period between November 11, 1964 and June 1965, used Copperstate for the transportation of 2 or 3 shipments a week averaging 150 pounds per shipment to Baton Rouge, New Orleans, Plaquemine and Opelousas, and had used Copperstate as the originating carrier for shipments to these points prior to November 1964. However, it has not used Copperstate exclusively for service to the indicated points because in the year ended in June 1965, Braswell transported 76 shipments for this manufacturer weighing a total of 16,462 pounds which moved to Beaumont, Tex., Lake Charles, Baton Rouge, New Orleans, a point in Mississippi and to 21 additional points in southern Louisiana. Again however, the handling of shipments destined to points beyond the points Braswell is authorized to serve was not shown. (California Originals, Incorporated. Tr. pg. 3176).

51. A manufacturer of decorative candles located at South Gate, Calif., which ships most of its products just prior to Christmas, since November 1, 1964, has used Copperstate exclusively to Lake Charles, Baton Rouge and New Orleans, and in that period used it for 1 shipment to Lake Charles weighing 62 pounds, 3 to Baton Rouge

weighing 500 pounds, and 3 destined to New Orleans weighing 470 pounds. It also has used Copperstate for 7 shipments a week weighing less than 100 pounds each to New Orleans which are destined to points east of Louisiana. (Bee Industries Limited. Tr. pg. 3178).

52. A Los Angeles manufacturer of engines and engine parts has used the services of Copperstate since November of 1964, for the transportation of its engines which require "overhead handling" and open-top equipment, and also for small parts weighing from 15 to 40 pounds per shipment on a weekly basis to Lake Charles, Baton Rouge and New Orleans. (Cooper-Bessmer Corporation. Tr. pg. 3180).

53. A Pasadena, Calif., manufacturer of pumps and pump parts has used the services of Copperstate weekly since November 1964, from Pasadena for the transportation of 3 shipments to Beaumont weighing 580 pounds, of 5 weighing 7,046 pounds destined to points in Alabama and Mississippi and for 24 shipments weighing 39,801 pounds destined to such Louisiana points as New Orleans, Port Sulphur, New Iberia, Jennings and Morgan City. In the year ending in June 1965, Braswell transported 2 shipments for this shipper weighing 625 pounds which were destined to 2 points in the New Orleans commercial zone. (Johnston Pump Company. Tr. pg. 3180).

54. A manufacturer of diving boards located at Baldwin Park just east of Los Angeles, since November of 1964 has tendered 1 shipment a week to Copperstate which are destined to points in Louisiana and points east thereof. Its boards range in weights from 90 to 150 pounds and are shipped in bundles of from 6 to 50 per shipment. In a 6-month period in 1965, Copperstate transported 12 shipments for it which were destined to Lake Charles and Baton Rouge. (Continental Diving Board, Incorporated. Tr. pg. 3181).

55. A wholesale distributor of magazines located in

Houston receives carloads of magazines daily at that point and ships them by motor carrier to Baton Rouge and New Orleans weekly. It used the services of the England companies perhaps for six months prior to their cessation of operations and thereafter used the service of Herrin and Ryder until the service of Copperstate under temporary authority was offered to it. Its magazines are released to the public on specified dates. The service it seeks from Houston to New Orleans and Baton Rouge is one which will assure it of being able to furnish magazines to distributors at those points in time to release them on time. A 2-day service would be satisfactory for it. It received complaints of the service Herrin and Ryder provided but has received none since Copperstate commenced serving it. In order for Copperstate to serve it from Houston to Baton Rouge it would require Copperstate to operate into New Orleans and back haul to Baton Rouge under temporary authority. Copperstate could provide overnight service to Baton Rouge directly but would require an extra day if the traffic were moved through New Orleans. (G. A. White. Tr. pg. 2126).

56. A Houston distributor of butterfly valves used in such industries as oilfield exploration, ship-building, and distilling, which has used the service of Copperstate to Baton Rouge and New Orleans, and ships to other southern Louisiana points, supports the application emphasizing that Copperstate provides Saturday pickups when called and other carriers have refused to make such pickups and to make late pickups—after 7 p.m. It has from 3 to 5 shipments a day to Louisiana points ranging in weights from 15 to 10,000 pounds each. It ships an average of 6,000 pounds of freight a week to Louisiana points. It does not show the extent to which it needs service of any kind to points on the regular route in Louisiana sought by Copperstate except Baton Rouge and New Orleans. (Keystone Valve Corporation. Tr. pg. 2291).

APPENDIX J.

Analysis of shipper and receiver evidence supporting eastbound service to Beaumont, Tex., Lake Charles, New Orleans, La., and points within 10 miles of New Orleans from (1) Houston itself, (2) points in Texas located on the regular routes of Copperstate, and (3) points located on the regular routes of Copperstate west of El Paso:

(1) From Houston:

1. A builder in New Orleans specializing in the construction of homes using steel siding, which is produced in 16 different colors, receives its emergency supplies of such siding from Houston by motor carrier. Since November 1964, it has used the services of Copperstate 2 or 3 times each week for shipments ranging in weights from 150 to 4,000 pounds each. Copperstate has provided it with consistent overnight service, whereas a shipment it tendered to Ryder since it began using Copperstate required 4 working days to be transported from Houston to New Orleans. It has also used the services of Herrin and Red Ball but prefers using Copperstate because it can place an order with its supplier in Houston at 1:00 p.m. one day and receive that shipment the following day. (Housecraft. Tr. pg. 1919).

2. A Houston manufacturer of pillows, pads, mattresses, blankets and other similar light articles—known as fluff traffic—is now using the services of Copperstate to New Orleans and has used the services of Herrin continuously in the past. It has the problem that carriers transporting its traffic use it to fill out loads to visual capacity. For example, it ships 1,500 pounds of its pillows, primarily to New Orleans, using Copperstate which furnishes it one trailer a day. A 40-foot trailerload of its products would

weigh from 3,500 to 4,500 pounds. Herrin likewise furnishes it with one trailer a day and will not as a rule accept more than one trailerload of its freight a day. Ryder's services have not been used since August 20, 1946 as it does not desire this shipper's traffic. It would like for all of its traffic to be taken each day but believes that Herrin has made a sincere effort to handle its high cube lightweight traffic. (Pearl Pillow. Tr. pg. 2193).

3. A manufacturer located at Houston which manufactures corrugated shipping cartons shipped knocked down flat in bundles and in turn used for packing and shipping furniture, has used the service of Copperstate for from 6 to 8 shipments over a 5-month period of shipments ranging in weight from minimum to 4,000 pounds each to Lake Charles and New Orleans of which some were destined beyond New Orleans. This single-line and joint-line service has been without complaint. Prior to using Copperstate this shipper used Ryder to Lake Charles and New Orleans. One complaint against Ryder is that it sent an open-top trailer to pick up a shipment of corrugated boxes in pouring down rain. If these boxes become wet they would come apart and be of no use. As a result the shipment was tendered to another carrier the next day. Ryder also has sent dirty and greasy trailers to pick up its shipments. One shipment transported for it by Ryder a year prior to the hearing was refused by the consignee because of grease damage and returned to the shipper. This was a shipment transported by Ryder to a Mississippi point served directly by it. This shipper has not used the service of Herrin for several years to New Orleans but gave it three shipments to Alexandria three days prior to the hearing. (Texas Corrugated Box Corporation. Tr. pg. 2233).

4. A dealer in Houston dealing in photographic supplies and equipment used in connection with oilfield exploration and development ships from 1 to 5 shipments of its prod-

ucts a day to New Orleans which range in weight from Minimum to 1,000 pounds each averaging perhaps 500 pounds each. It began using the service of Copperstate to New Orleans 60 days before the hearing when it discontinued using Ryder and Herrin which it had used theretofore. Neither Herrin nor Ryder provided pickup of its freight the same day it called them. Ryder's representatives advised this shipper's representatives that Ryder was not interested in handling ltl freight but rather desired freight moving in truckload quantities. This shipper has found the service rendered by Copperstate satisfactory to its needs, believes there is a need for the continuance of it on a permanent basis and would continue to use it if it is made permanent. (Lew Wenzel & Company. Tr. pg. 2252).

5. A manufacturer of galvanized transmission towers, transmission poles, street lighting standards and accessories, which are shipped from Houston to public utilities and other manufacturers of electrical equipment, supports the applications. Its poles are shipped in sections weighing up to 5,000 pounds each and are therefore loaded by use of crane or forklift equipment. This company's policy is to require carriers to use 40-foot flat-bed trailers to minimize the hazards of loading. The crane or forklift operator would be unable to see clearly when loading into an open-top trailer. This shipper has used Copperstate for the transportation of 2 shipments to Gretna and 1 to Westwego, which are points located in the New Orleans commercial zone. Deliveries of transmission pole sections, street lighting standards, and other transmission tower parts are coordinated with the schedules of work crews of the installer of such items. The installing crews with their own equipment move from city to city. While this shipper gives carriers 24 to 48 hours notice to obtain flat-bed equipment it has been unable to obtain any from Strickland, Herrin or Ryder and has used an oilfield carrier for its transportation

needs to Gretna and Westwego prior to the time it commenced using Copperstate. (Universal Pole Bracket Corporation. Tr. pg. 2375).

6. A Houston manufacturer of pipe fittings, nipples, swedges, conduit, couplings, and pipe plugs needs flat-bed equipment at times on short notice to ship its commodities which are shipped in truckload quantities to its warehouse in New Orleans at the rate of 500,000 pounds a year. (White Manufacturing Company. Tr. pg. 2538).

7. A warehouser and shipper of oil well tools which are shipped from its Houston warehouse to divisions of its company located at Lake Charles and Harvey, has used the service of Copperstate a few times in a 6-month period to those points of shipments weighing from 150 to 200 pounds each. (McCullough Tool Company. Tr. pg. 2527).

(2) From Texas:

1. A manufacturer of table lamps, ash trays, record cabinets and desks, located at Bangs, Tex. (near Brownwood), ships its products to chain variety stores located at New Orleans using Copperstate almost exclusively. From September 1964 until January 1965, it used Copperstate in connection with other delivering carriers. No other protesting carrier is authorized to serve Bangs. Copperstate originates about 90 percent of the 10,000 pounds of traffic which it ships daily to New Orleans or to points east of Louisiana. Its shipping schedules are coordinated to advertising programs of the stores to which it ships. (Texans, Incorporated. Tr. pg. 1203).

2. A manufacturer of leather gloves located at Brownwood ships 3 to 4 shipments a week of its products to New Orleans for export or movement to points east of New Orleans, with a monthly volume of up to 1,800 pounds. Its representative expects its market to grow if it is able to use the single-line service proposed by Copperstate as far

as New Orleans. No protesting carrier is authorized to serve Brownwood. (Texas Glove. Tr. pg. 1228).

3. A manufacturer of garbage truck body parts and parts used for motors used in heavy road rolling equipment, located at San Antonio, ships the indicated parts twice a week to dealers in New Orleans in shipments ranging in weight from 50 to 500 pounds and averaging 200 pounds each. It has used the joint-line service of a nonprotestant and a connecting carrier over Houston and the single-line service of Strickland. It would continue to use the Copperstate service to New Orleans if its authority is made permanent. (Tampo Manufacturing Company. Tr. pg. 1248).

4. A San Angelo food processor of pickled okra and relish in a 3-month period shipped over 20,000 pounds of its products eastward of which 7,000 pounds went to New Orleans, 17,000 pounds to points east of New Orleans of which 11,500 pounds went to Florida. While no other protestant serves San Angelo this shipper complains that its representative is required to wait 2 to 4 hours for pickup. The witness for this shipper desires prompt pickups because he is the manager and sole employee and says "when I finish my shipments I am through for the day" even though this be around noon. (Talk-O-Texas Brands, Inc. Tr. pg. 1742).

5. A manufacturer of drugs and cosmetics ships 1,500 pounds of its products a month from San Antonio to New Orleans and from 5 to 10 tons a month to points east of New Orleans most of which is destined to Florida points. It has used the services of Central Freight Lines to the Houston gateway but has had difficulty in tracing shipments with the carriers operating east of Houston. It has available the single-line service of Strickland to New Orleans but discontinued using Strickland. It has used the two-line service of East Texas to Shreveport and Red

Ball to New Orleans on a customer routing. It uses the single-line service of East Texas from San Antonio to Atlanta. Copperstate has offered to provide two day service from San Antonio to New Orleans. Brown does not serve this shipper because its traffic moves in ltl quantities, Brown's representatives advising its representatives that Brown desires only truckload traffic. Copperstate could render single-line service for this drug manufacturer to New Orleans but more of its traffic moves east beyond New Orleans than to New Orleans and it would still have joint-line service using Copperstate as the origin carrier. (Texas Pharmacal Company. Tr. pg. 1805).

6. A manufacturer of wire rope and wire rope fittings used in shipyards and oilfields which is located at Austin and has a warehouse at New Orleans has used the service of Copperstate for three months on shipments weighing from 200 to 2,500 pounds each. It keeps substantial stocks of its products in New Orleans as it is in competition with a northern manufacturer of similar products and when it is able to draw from its New Orleans stock to furnish shipyards and oilfields around New Orleans it is able to meet its competition. New Orleans is a substantial market for its products as it has itself transported 20 to 25 tons of them from Austin to New Orleans. If Copperstate obtains authority to serve New Orleans it would give a majority of its traffic to Copperstate and divert it from its own private carriage. It usually has from 1 to 3 days to fill orders but sometimes fills special orders, and expects Copperstate to give second-morning service from Austin to New Orleans. (Holloway Company. Tr. pg. 1821).

7. A wholesaler of office and school supplies and military items which are shipped from San Antonio to and through New Orleans to a number of military bases located in Louisiana and points east of Louisiana has used Copperstate once a week over a 4-month period for ship-

ments ranging in weight from minimum to 800 pounds each. It has a small dock space and picks two or three carriers who can give the best service in all directions. It has used Copperstate in the past to other points and uses Central exclusively to some points and finds its service dependable and reliable. It uses East Texas for emergency shipments. It has used the joint-line service of Central to Houston and Herrin to Keesler Air Force Base, Miss., but had complaints against Herrin on one shipment. It has had no complaints since using Copperstate as the originating carrier even when a two-line service was involved. (Southern Album Company. Tr. pg. 1845).

8. A manufacturer of votive lights and candles which ships its products from San Antonio to churches and synagogues in Louisiana and points east thereof supports the Copperstate applications to obtain a two-line service to points beyond Louisiana using Copperstate to the New Orleans gateway. Since it commenced using the service of Copperstate it has been pleased with deliveries beyond New Orleans. It ships an average of 15,000 pounds each month via Copperstate and in peak months up to 50,000 pounds. It has used the single-line service of Strickland to New Orleans without complaint except as to tracing. It has the services of East Texas and Campbell Sixty-Six to Mississippi points as well as Strickland and West Bros. It has used other nonprotesting originating carriers. This shipper complained at the hearing that Braswell had lost a 153-pound shipment of candles tendered to it on April 12, 1965 and destined to a rural church near Natchez, Miss., which had remained undelivered as of May 11, 1965. Braswell showed however, that the freight bill was dated April 14th, a Wednesday, that the shipment arrived in Natchez April 20, a Tuesday, on the sixth day following, was tendered to the consignee five times without finding anyone to accept it and was finally delivered on

May 11, 1965. Braswell serves this shipper regularly and in a year's time has transported 39 shipments for it weighing 13,902 pounds which moved to 18 Mississippi points, West Monroe, Alexandria, Cut Off (near Houma), and Harahan in the New Orleans commercial zone. Only two of these shipments would be directly competitive to the service proposed by Copperstate and only the Harahan shipment if the purchase alone is approved. (A. I. Root Company. Tr. pg. 1906).

9. A moving and storage firm located in El Paso ships crated household goods in shipments weighing an average of 1,500 pounds each at the rate of 2 to 3 each week from El Paso to New Orleans over the lines of Copperstate and is receiving service characterized as very good and desires that it be continued. These household goods are moving as crated household goods in general commodity service. (Daniels Moving and Storage Company. Tr. pg. 2003).

10. A manufacturer of delicate missile and aircraft precision machine parts ships from its company's plant at Abilene to New Orleans. At the time of the hearing it had a contract for the manufacture of such parts to be shipped to New Orleans over a period of 8 months commencing in July 1965. Initially it would ship 200 pounds each week and expects to ship as much as 5,000 pounds a month. It has no assurance af a renewal of its contract and would have no continuing need for the service of Copperstate so far as this record shows. (Automation Industries. Tr. pg. 2024).

11. A household goods transfer and storage company and warehouse, of Abilene, stores, crates and ships crated household goods on behalf of individuals for export through New Orleans. The crates in question are plywood crates of 192 cubic feet capacity. This company has utilized the general commodity service of Copperstate for transportation of such crated household goods at the rate of 2 to 3

times a month. It controls the selection of the carrier which could be Copperstate, other general commodity carriers, rail carriers, or household goods carriers. It would continue to utilize the single-line service of Copperstate for these crated household goods to New Orleans if made available on a permanent basis. It has an occasional shipment of canned goods moving from New Orleans to Abilene. (W. T. Wilson Transfer and Storage Company. Tr. pg. 2054).

12. A manufacturer of insulating material used for insulating refrigerators, among other uses, with a plant and shipping point at McQueeney, Tex., a point near Sequin east of San Antonio and on a Copperstate Texas route, would use the service of Copperstate to such Louisiana points as Lake Charles and New Orleans as Herrin does not desire to perform the short haul on this traffic from Houston to Lake Charles as on one occasion the originating carrier (Central) had difficulty in getting Herrin to accept an interchange shipment at Houston destined to Lake Charles, although it did eventually accept it. (B & B Engineering Company. Tr. pg. 2209).

(3) From points west of El Paso:

1. A manufacturer of industrial and office staples, staplers, nails and nailers, with a warehouse in New Orleans, and a manufacturing plant in Visalia, Calif., ships its products from Visalia to New Orleans at the rate of perhaps 2 shipments a month ranging in weights from 400 to 1,100 pounds each. It is now using the single-line service of Copperstate and had used the single-line service of Copperstate in connection with other carriers including Ryder and the vendor companies. The record contains examples of the joint-line service of Copperstate and Ryder over Houston showing transit time of from 5 to 8 days on three selected shipments with week-ends intervening in each instance.

The record also shows an example of the joint-line service of Navajo and Red Ball over Amarillo for this shipper showing transit times of 7 and 11 days for two selected shipments with a week-end intervening in the first and two week-ends in the second. An example of the multiple line service of Copperstate, England of Texas and England over Houston and Lake Charles shows fourth day delivery with no week-ends intervening so that the shipment was originated in Visalia on Monday and delivered in New Orleans on Friday. While this shipment was selected from 14 similar shipments the transit time of the other 13 is not of record. (Bostitch-Southern, Incorporated. Tr. pg. 1584).

2. A manufacturer of large blowers mounted on skids used in oilfield work, located at Westlake, La., a point located within 4 miles of the city limits of Lake Charles and thus within the commercial zone of that city (*Commercial Zones and Terminal Areas (Lake Charles, Louisiana)*, 83 M. C. C. 668) supports the application for service from Compton, Calif., to Westlake. Service to Westlake can be provided under a combination of the rights of Copperstate and England of Texas. This manufacturer receives the motor blower components of the unit it assembles in Westlake at the rate of 6 a year. It desires a 4-day service from Compton. When it receives an order for a blower it commences the construction of the skid and related piping and at the same time places an order for the motor blower assembly at Compton. If it could receive that assembly on the fourth working day after the order is placed it would not be held up from completing the unit by reason of not having the assembly on hand. These assemblies are not kept in stock as they cost $600 each. This receiver showed examples of the joint-line service afforded by Transcon and Herrin but 2 shipments moved over week-ends one including the Christmas holiday and the other

both Christmas and New Year's holidays. (Industrial Supply Company of Louisiana, Incorporated. Tr. pg. 2081).

3. An engineering firm which engages in the designing, selling, shipping and installing of belt and roller conveyer systems for materials handling used in manufacturing plants, controls the routing of traffic moving from Chino, Calif., where these systems are manufactured. It specifies Copperstate for all traffic moving for it from Chino. Its interest in these proceedings is that it has recently acquired Louisiana as a sales territory for the same type of equipment used in systems it has installed in Texas. The volume of traffic which might move from Chino to Louisiana points for it was not indicated for this record. Its needs appear to depend upon its success in selling installation jobs in Louisiana. It appears to support the applications because of its satisfaction in utilizing Copperstate to points not involved here. (Industrial Handling Engineers. Tr. pg. 2313).

4. A Torrance, Calif., manufacturer of oilfield tools which are shipped from its plant in Torrance to its warehouse located in Harvey which is located in the New Orleans commercial zone, has used the services of Copperstate for 3 months for about 15 shipments weighing an average of 8,000 pounds each. (B & W, Incorporated. Tr. pg. 2445).

5. A manufacturer of steel sawmill chains at Portland, Ore., which ships its commodities to Louisiana points and has shipped to St. Francisville, Elizabeth and Oakdale which are not in the irregular route area involved herein and to points in Florida, Georgia, Alabama and South Carolina has used Copperstate for shipments to points in those States through the New Orleans gateway. Previously it had used the services of two nonprotesting motor carriers and a freight forwarder but since the institution of service by Copperstate under temporary authority has diverted its

traffic to Copperstate. The diversion was because of tracing problems. It supports the application for permanent authority and in the opinion of its witness it would be an advantage for his company to have such service. (Portland Chain Manufacturing Company. Tr. pg. 2604).

6. A Hawthorne, Calif., manufacturer of sporting goods, including sleeping bags, tents and camping equipment, since January 1, 1965 has used Copperstate to Shreveport and to New Orleans on traffic moving to points in Georgia, Florida and Alabama. Prior to January 1965 it used the service of a nonprotesting motor carrier and a freight forwarder. It believes there is a need for the continuance of the Copperstate service and supports the applications for that purpose although it had not used a service through the Los Angeles gateway prior to using Copperstate. (Hirsch-Weiss Canvas Products. Tr. pg. 2618).

7. The Portland, Oreg., manufacturer of Bag Boy golf carts supports the proposed single-line service of Copperstate from Portland to New Orleans apparently so that it could use its service on traffic moving through the New Orleans gateway to Atlanta from where it makes its distribution of such carts throughout the South. Prior to using Copperstate to the Louisiana point it used two nonprotesting motor carriers as the originating carriers for service via the Denver gateway. (Jarman Williamson Company. Tr. pg. 2655).

8. A Santa Monica, Calif., manufacturer of automotive parts which ships steering hoses and repair kits to New Orleans began shipping its products to New Orleans in August of 1964 and ships them at the rate of one or two shipments a month averaging 200 to 400 pounds per shipment so that it ships about 500 pounds a month to New Orleans. It began using Braswell and of two shipments tendered to it, one in August and one in October of 1964,

the August shipment was handled without complaint but the October shipment was never satisfactorily traced for the shipper by Braswell. However, Braswell separately shows that the October shipment was delivered to the consignee in New Orleans on the fourth morning after it was picked up from the shipper. This shipper also used the joint-line service of a non-protesting originating motor carrier in conjunction with an unnamed delivering carrier. It contends that a joint-line shipment transported by the last referenced motor carriers required 16 days to reach New Orleans. The statement that the shipment required 16 days was based on a notation made on the bill of lading of the shipment in the possession of the shipper and was made in the regular course of business upon inquiring of the consignee or one of the carriers handling the shipment as to its delivery. The writing on the bill of lading signifying the delivery time could have been "16" meaning 16 days or "16th" meaning the 16th day of the month. The witness asserted it was "16" meaning 16 days. The shipment was dated September 11, a Saturday, and if delivered on the 16th of September—the following Thursday—a four working day service would have been provided. If 16 days in transit it would have been delivered on a Monday—the 27th day of September—requiring 11 working days in transit. After this experience, and having been solicited by Copperstate this shipper changed to Copperstate and believes there is a continuing need for its single-line service to New Orleans. Its volume to New Orleans would not exceed 6,000 pounds a year. (Omega Manufacturing Company. Tr. pg. 2694).

9. A manufacturer of high pressure pipe fittings is using the service of Copperstate without complaint from its plant at Cudahy, Calif., to a customer located at Lake Charles. It had used the service of J. H. Rose prior to starting to use Copperstate. (Southern California Oil Tool Co. Inc. Tr. pg. 2740).

10. A Portland, Oreg., manufacturer of industrial cutting and fastening products, primarily chain saws, electric welders, abrasive cutting wheels, related products and their accessories has used the service of Copperstate from Portland to Metairie since January of 1965, prefers a single-line service where available, supports the application for a permanent service, and is of the opinion there is a need for such service. (Omark Industries, Inc. Tr. pg. 2758).

11. A manufacturer of refrigerated soft drink vending machines has shipped 40 of these machines weighing a total of 100,000 pounds from its Pinedale, Calif., plant located near Fresno to New Orleans via Copperstate between December of 1964 and the date of the hearing. It has used the services of other nonprotesting motor carriers and uses the joint-line service of Western Gillette and Herrin on customers' routing and in 1964 the Western Gillette-Herrin service handled 15 shipments for it. (Vendorlator Manufacturing Company. Tr. pg. 2815).

12. A manufacturer of sprinklers, automatic clocks and valves used principally by golf courses and for agricultural purposes, ships its commodities from Fresno, Calif., to New Orleans and to points in Florida, Alabama and Georgia, has used Copperstate since February 1965. Prior thereto this type of traffic was divided between two nonprotesting carriers and Braswell. In a year between June 1964 and June 1965 Braswell transported 1 shipment for this shipper weighing 44 pounds destined to New Orleans. (Buckner Industries. Tr. pg. 2873).

13. A manufacturer of industrial rubber products, including solid tires, of Lodi, near Stockton, Calif., has used Copperstate service on its traffic moving to points in Alabama, Tennessee, North Carolina, Florida and Georgia and would use Copperstate service to unspecified points in Louisiana if the applications are granted. (Holz Rubber Company. Tr. pg. 2902).

14. An agricultural cooperative association of Stockton, Calif., composed of 5,000 members ships shelled and unshelled walnuts from Stockton to New Orleans and Metairie. (Diamond Walnut Growers. Tr. pg. 2917).

15. A manufacturer of brake bonding equipment used in the automobile rebuilding industry ships its commodities from Huntington Park in the Los Angeles area to Beaumont and New Orleans and to points in Florida and Georgia. (Gigg Specialty Tools. Tr. pg. 2950).

16. A freight forwarder with authority from the Commission to operate from Los Angeles and San Francisco to New Orleans among other points, would use the single-line service of Copperstate from these West Coast points to New Orleans if made available on a permanent basis. Approximately three and one-half years prior to the hearing it used the service of Braswell from Los Angeles to New Orleans but when Braswell advised it that after April 7, 1961, full tariff rates would be assessed, it discontinued using Braswell for its freight forwarder traffic. This freight forwarder is also a customs broker and tenders traffic to carriers as a shipper's agent. The record does not show what needs it has for motor carrier transportation in connection with its customs brokerage business. (Frank P. Dow Company. Tr. pg. 2960).

17. A Los Angeles manufacturer of commercial and domestic water treatment systems and water softeners needs flat-bed equipment for the transportation of its products from the City of Industry in the Los Angeles area to New Orleans. Its systems range in weight from 6,000 to 100,000 pounds each and are moved for it by heavy haulers at weights in excess of 15,000 pounds each. Copperstate would not be requested to transport a shipment requiring special equipment because of its size and weight but would be expected to furnish flat-bed equipment on shipments loaded by crane. Braswell does not station line-

haul flat-bed equipment in Los Angeles and is required to have advance notice when a shipment requiring a flat-bed trailer is to be tendered and in that event leases such equipment from another motor carrier. This shipper needs motor carrier service for the transportation of entire systems and softeners which require the use of special equipment, or which may be transported in ordinary flat-bed equipment, and separate service for the transportation of parts of those systems and softeners. (Los Angeles Water Conditioner Company. Tr. pg. 2990).

18. A manufacturer of shopping carts, stock carts, wheel chairs and stamp machines, some of the carts of which are shipped stacked but others are bulky and cannot be stacked, which move from Glendale, Calif., in the Los Angeles area for delivery or for movement to points east of Louisiana ships at the rate of 1 shipment a day ranging in weights from 38 pounds to 500 pounds each which have been transported by Copperstate exclusively beginning in November of 1964. Since commencing to use Copperstate to New Orleans it has discontinued using a nonprotesting carrier and Braswell. In the 12-month period from June 1964 to June 1965, Braswell transported 6 shipments for this shipper weighing 2,588 pounds moving to New Orleans. (Teknabuilt Corporation. Tr. pg. 3022).

19. A manufacturer of washing compound and bubble bath materials which ships its products from Beverly Hills to wholesale and retail stores in Lake Charles and New Orleans and to points east of New Orleans, beginning in October of 1964 has used the single-line service of Copperstate to New Orleans. (Robert H. Clark Company. Tr. pg. 3050).

20. A seed grower which distributes seeds from Mountain View, Calif., near Palo Alto as a regulated commodity in ltl quantities which require protection from rough handling and moisture, even prior to temporary authority

herein used the joint-line services of Copperstate and Ryder through the Houston gateway and tried the joint-line services of Western Gillette and another carrier with Western Gillette as the originating carrier to Tampa. Since November 1964 (after temporary authority was exercised) it began using the single-line service of Copperstate and Central over New Orleans to Tampa. While it is more economical for this shipper to ship its seeds in truckload quantities as an unregulated commodity, it desires a single-line ltl service to eliminate unnecessary handling of its products which move in cartons and bags and an expedited delivery. In a year's time Braswell handled a single shipment for this shipper to New Orleans weighing 673 pounds. (Ferry Morse Seed Company. Tr. pg. 3064).

21. A corporation controlled by an association of colleges which is engaged in astronomical observations and the construction of telescope complexes, controls the shipping of commodities used in their construction including lens, telescopes, electronic materials and a variety of other commodities used in the construction of large telescopes, and controls the routing of these commodities and ships many of them from Tucson, Ariz., to Chili where a large telescope complex is being constructed. It had used the single-line service of Copperstate from Tucson to New Orleans for export for three months prior to the hearing. It had used Braswell for three years prior to that but discontinued when Braswell refused to pay a small claim and it lost confidence in Braswell. It expects to complete the Chilean telescope complex in five years and would have two shipments a month weighing from 500 to 5,500 pounds each moving to New Orleans for export to Chili over that period. (AURA, Inc. Tr. pg. 3077).

22. A manufacturer of paper labels located at San Francisco has used the Copperstate service since November 30, 1964 in the transportation of its products from San Fran-

cisco to New Orleans for delivery there and interchange for movement to points beyond. (Louis Roesch Company. Tr. pg. 3091).

23. A manufacturer of electronic materials consisting of plastic and copper wire coils and molding, which are shipped from Sunnyvale, Calif., to New Orleans has used the service of Copperstate to New Orleans since December 1964. (Illumitronics Corporation. Tr. pg. 3093).

24. Two manufacturers of filters located at San Jose, Calif., have used Copperstate over a period of 3 years in the transportation of their products from San Jose to New Orleans at the rate of 2 or 3 shipments per month weighing approximately 400 pounds each. (En Fab, Incorporated and Filters, Inc. Tr. pg. 3094).

25. A company of San Francisco which ships annually 75,000 to 80,000 pounds of printing inks and paints to New Orleans has used the service of Copperstate and the joint-line service of Western Gillette and Herrin to New Orleans. (Sale, Inc. and Chemical Company of San Francisco. Tr. pg. 3096).

26. A manufacturer of drugs ships drugs and intravenous solutions from Berkeley, Calif., to its branch at Metairie, La., and has used Copperstate for 5 months prior to the hearing. In April and May of 1965, it shipped 24 shipments via Copperstate to Metairie. (Cutter Laboratories. Tr. pg. 3099).

27. A company of Delray, Calif., near Fresno which packs and ships dried fruits and whose shipping season is between October and December of each year began using Copperstate in single-line service from Delray to New Orleans in November of 1964. It also has shipments moving to points east of New Orleans. (Garry Packing Company. Tr. 3100).

28. A manufacturer of vitreous drinking fountains has shipped its commodities from Berkeley, Calif., to New Or-

leans for delivery and interchange for movements beyond using the single-line service of Copperstate to New Orleans beginning in November of 1964. (Howse Drinking Faucets Company. Tr. pg. 3101).

29. A Hawthorne, Calif., manufacturer of commercial hardware used especially for schools, hospitals and government projects, began using the single-line service of Copperstate from Hawthorne in November 1964 to New Orleans shipping 1,000 pounds a week to New Orleans, half of which moves beyond. It had used Braswell and a nonprotesting carrier but has discontinued their use. (Quality Hardware Manufacturing Company. Tr. pg. 3105).

30. A manufacturer of oilwell casing assemblies ships its products from Redondo Beach, Calif., to its company warehouse at Harvey. In the first 6 months of 1965 it shipped 90,000 pounds of its products via Copperstate at the rate of 2 shipments a month. (B & W Incorporated. Tr. pg. 3111).

31. A Venice, Calif., manufacturer of three dimension fiberglass advertising figures, which range in size from that of a man to that of a 20-foot animal, and when crated the largest would weigh only 375 pounds, has used the services of Copperstate beginning in February 1965 to New Orleans. Its traffic is light and bulky and is problem freight. It supports the application to receive a continuation of the service Copperstate has rendered for it. (International Fiberglass Company. Tr. pg. 3125).

32. A Vernon, Calif. (adjacent to Los Angeles), concern beginning in October 1964 has shipped chairs and glass topped tables in cartons on an average of four 300-pound shipments a month to New Orleans via Copperstate. In the year between June 1964 and June 1965, Braswell transported 10 shipments for this shipper weighing 2,180 pounds from Vernon to New Orleans. (Mallin Company. Tr. pg. 3151).

33. A Los Angeles concern dealing in novelty items made

of straw, bamboo and earthenware used the services of Copperstate beginning in February 1965 to New Orleans for the transportation of 4 shipments weighing 591 pounds destined there and for 53 shipments weighing 6,480 pounds destined to points east of Louisiana. (American-Asian Company. Tr. pg. 3153).

34. A manufacturer of electric and pneumatic tools in various forms, among other products, located in Los Angeles, beginning in November of 1965, has used Copperstate for service to New Orleans on shipments weighing from 90 to 1,868 pounds each at the rate of 3,000 pounds a month with some shipments moving east of Louisiana. (Semco Sales Company. Tr. pg. 3156).

35. A Los Angeles concern which ships animal tonics and feeds began using the service of Copperstate in January of 1965 and used its service for 14 shipments weighing 4,800 pounds to New Orleans for delivery, and 30 shipments weighing 8,000 pounds to the New Orleans gateway for interchange which were destined to 40 points east of Louisiana. (Specialized Pet Diets, Inc. Tr. pg. 3160).

36. A manufacturer of protective coatings, including paint and corrosive control materials, located at Brea, Calif., a point 27 miles southeast of Los Angeles and north of Anaheim, since January of 1965, has used Copperstate for the transportation of from 10 to 15,000 pounds of its products a month moving to Houston, a portion of which is reshipped to its warehouse in New Orleans with pickups in Brea scheduled for each Monday morning. In the year ended in June of 1965, Braswell originated three shipments for this shipper at Brea destined to Morgan City and weighing a total of 55,242 pounds, but whether Braswell gave up the shipment short of its destination is not shown. (Americoa Corporation. Tr. pg. 3162).

37. A shipper located at Costa Mesa, Calif., a point

south of Los Angeles whose products were not specified, began using Copperstate in March of 1965 to the New Orleans gateway. From then until June 21, 1965, Copperstate transported 61 ltl shipments for it weighing 24,728 pounds to the New Orleans gateway which were destined to various destinations east of Louisiana. (Kackrath Systems, Inc. Tr. pg. 3164).

38. A Los Angeles manufacturer of steel medicine cabinets and mail boxes used Copperstate over a 4-month period for the transportation of 16 shipments to New Orleans weighing 3,500 pounds. In the year ending June 1965, Braswell transported 60 shipments for this shipper weighing 11,597 pounds which were destined to Baton Rouge, New Orleans, and Lafayette. (Durra Steel Products Company. Tr. pg. 3165).

39. A manufacturer of insulated copper wire, aluminum extrusions, carpet and rubber cement and related products, located in the City of Industry, Calif., between December, 1964 and April, 1965, used Copperstate for the transportation of 9 shipments destined to New Orleans weighing 5,436 pounds and for 8 shipments to New Orleans destined to points east of Louisiana. In the year ending in June 1965, Braswell transported 2 shipments for this shipper to New Orleans weighing 1,705 pounds. (Tak-Trak, Inc. Tr. pg. 3166).

40. An Inglewood, Calif., manufacturer of plastic hose and attachments, between December 1964 and May of 1965, used Copperstate for the transportation of 12 shipments destined to New Orleans weighing 9,000 pounds and 1 shipment to New Orleans destined to a point east of Louisiana weighing 600 pounds. (Plasti-Flex Company. Tr. pg. 3167).

41. An Alhambra, Calif., manufacturer of wall furnaces, in the period between October 29, 1964 and June of 1965, used Copperstate for the transportation of 3 shipments of its products to New Orleans which weighed a total of 48,155

pounds. (The transcript incorrectly shows 448,155 pounds.) (Commonwealth Company. Tr. pg. 3169).

42. A distributor of magazines and paperback books, located at Los Angeles, between January and May of 1965, used Copperstate for the transportation of 16 shipments destined to Lake Charles, Baton Rouge and New Orleans weighing a total of 5,000 pounds and for 64 shipments to the New Orleans gateway destined to points east of Louisiana weighing 20,100 pounds. In the year ended June 1965, Braswell transported 13 shipments for this shipper weighing 4,009 pounds which were destined to Beaumont, Tex., and Lake Charles, Baton Rouge, New Orleans and Crowley, La. (All American Distributors. Tr. pg. 3171).

43. A manufacturer of safety razors and razor blades ships these products and advertising materials from Culver City (Los Angeles). Between December 1964 and June 1965, it used Copperstate for the transportation of 7 shipments to Beaumont (900 pounds); 13 shipments to Lake Charles (1,500 pounds); 2 shipments to New Orleans (200 pounds); 3 shipments moving to other Louisiana points (400 pounds); and 18 shipments moving to New Orleans for destinations at points east of Louisiana. (Schick Razor Company. Tr. pg. 3173).

44. A Los Angeles manufacturer of gate hardware has used Copperstate for one and one-half years on traffic moving to points beyond Louisiana. Between January and June of 1965 it used Copperstate for the transportation of 4 shipments weighing 1,200 pounds to New Orleans for destinations east of Louisiana. In the year ending June 1965, Braswell transported 6 shipments for this shipper to New Orleans and Thibodaux weighing 1,936 pounds. (Aerosmith Tool Company. Tr. pg. 3174).

45. A Los Angeles manufacturer of timing gears for automobiles in the period of six months prior to June of 1965, used Copperstate for the transportation of 3 ship-

ments a week ranging in weights from 100 to 500 pounds each and moving to Beaumont, points in Louisiana or points east of Louisiana. (Martin Wells, Incorporated. Tr. pg. 3175).

46. A Santa Monica, Calif., manufacturer of paints and stains in the period of six months prior to June 1965, used Copperstate for the transportation of its products to New Orleans for delivery and for interchange for destinations east of Louisiana at the rate of 2 shipments a month ranging in weights from 300 to 1,000 pounds each. (Watco Dennis Corporation. Tr. pg. 3175).

47. A Gardena, Calif., shipper and receiver of automobile parts in the period between November 1964 and June 1965, used Copperstate for the transportation of 24 of its shipments weighing 5,000 pounds from Gardena to New Orleans and for 2 shipments weighing 250 pounds from New Orleans to Gardena. (Leland Triumph Sales Company. Tr. pg. 3176).

48. A fabricator of pipe and pipe fittings located at Compton, Calif., has used Copperstate as its originating carrier on traffic moving to Beaumont, Tex., New Orleans and points east of Louisiana since July 1964, tendering Copperstate 3 shipments a week ranging in weights from 500 to 2,500 pounds each. Twenty percent of these shipments require flat-bed equipment. (Associated Piping & Engineering Company. Tr. pg. 3177).

49. A Long Beach, Calif., manufacturer of salad oils and salad dressings ships its products from Seal Beach, Calif. Between October 1964 and June 1965, it used Copperstate for the transportation of 2 shipments destined to New Orleans weighing 450 pounds and for 7 shipments to New Orleans destined to points east of Louisiana. (Bernstein's of Long Beach, Incorporated. Tr. pg. 3177).

50. D & M Machine Company of Torrance, Calif., a manufacturer of tractor tread rollers, has used the services

of Copperstate twice weekly since December 1964, for shipments averaging 1,000 pounds each and destined to New Orleans, and for 11 shipments to New Orleans destined to points in Florida weighing a total of 11,600 pounds. In the year ended June 1965, Braswell transported 3 shipments from Torrance to Baton Rouge weighing 4,119 pounds for a shipper known to it as D & M Sales Company, Inc., which it apparently believes to be the same shipper as D & M Machine (D & M Machine. Tr. pg. 3179).

51. A Los Angeles manufacturer of products made of straw, between November of 1964 and June 1965, used Copperstate for the transportation of 2 shipments of its products to Beaumont weighing 300 pounds, 14 to New Orleans weighing 2,800 pounds, and 15 to other Louisiana points weighing 2,000 pounds. (Flex-Straw Company. Tr. pg. 3179).

APPENDIX K.

Proposed Findings of Fact and Conclusions of Law Requested by Protestants.

1. a. There is no showing that any operations have been conducted by either transferees[1] or transferors[2] since the grant of the temporary authorities to transferees to conduct the operations pending the determination of the section 5 applications.

   b. Clearly, therefore, there is a dormancy of all involved operations with the possible exception of operations under which transferees have conducted operations under temporary authority for approximately a year.

   c. In consequence thereof, if any authority were to be granted to transferees herein under the section 5 applications, the approval of such section 5 applications must be conditioned, of necessity, upon cancellation of so much of the involved operating rights except those conducted by transferees under temporary authorities.

2. a. All applicants failed to establish their burden of proof in showing the resulting proposed service under either the section 5 applications or the section 207 applications.

   b. In consequence thereof, the effect of the grant of such applications upon adequate transportation service rendered to the public generally and the effect of the grant of such applications on existing carriers, including motor carrier protestants, cannot be determined on the basis of the proof offered by applicants.

   c. The burden is that of applicants to establish by competent evidence their respective plans of operation and the extent to which operations will be conducted

---

1. Construed to mean Strickland and Copperstate.
2. Construed to mean England and England of Texas.

as a result of the grant of both the section 5 and section 207 applications, and since applicants failed in their burden in this respect, the applications must be denied in their entirety.

3. a. The section 207 applications in MC-22167 (Sub-No. 21) and MC-59630 (Sub-No. 142), and the proof offered in connection therewith, do not clearly reflect as to whether the applicants therein, Copperstate and Strickland, respectively, who are also the respective applicants in MC-F-8808 and MC-F-8798 proposed to abandon irregular route operations sought to be acquired in such section 5 applications.

b. Clearly, the record would not substantiate the grant to Strickland in MC-F-8798 of irregular route authority between specified points in Louisiana and the grant of regular route authority under MC-59630 (Sub-No. 142) between Shreveport and New Orleans, La., nor the grant to Copperstate of irregular route authority from Houston, Tex., to Lake Charles, La., and between specified points in Louisiana and regular route authority between Houston and New Orleans, La., via Lake Charles under MC-22167 (Sub-No. 21).

c. Therefore, absent the discharge of their burden to establish their proposal, Strickland and Copperstate are deemed to have abandoned their claim to irregular route operations under the section 5 applications in the event of favorable determinations of the section 207 applications.

4. a. Neither applicant met its burden of proof under section 5 to establish that the transactions are consistent with the public interest (i) the effect which the proposed transactions will have upon adequate transportation service, (ii) the effect which the grant of the applications will have upon existing motor carriers including protestants, (iii) the total fixed charges resulting from such transactions, (iv) the interest of carrier employees, (v) or that full utilization of the involved operating rights has been made.

b. Since applicants have failed to discharge their statutory burden of proof in these respects, the section 5 applications will be denied.

5. a. Neither applicant established in their respective section 207 applications the inadequacy of the existing transportation facilities and services, or that a real and tangible need existed for the creation of their respective services under such applications.

b. At best, such applicants established by public witnesses a preference for their proposed services and that the service rendered by such respective applicants under temporary authority under section 210a (b) had been satisfactory services.

c. This showing is insufficient to discharge the burden of proof wherein it is incumbent upon an applicant to establish by the substantial evidence whether the proposed operation will serve a public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing carriers, and whether proposed operations will endanger or impair the operations of existing carriers.

d. Neither applicant established that the public convenience and necessity require the service proposed by it under its respective section 207 application so as to warrant the grant of either of such section 207 applications.

6. a. Existing carriers were shown by protestants to be ready, willing and able to render a fully adequate service to meet the requirements of the public generally over the routes and between the points involved in the section 207 applications, and applicants therein failed to establish by substantial evidence any inadequacy in the existing transportation facilities and services.

b. Accordingly, applicants failed in their respective section 207 applications to establish any need for the proposed regular route services of such applicants.

7. a. Protestants established by substantial evidence that the grant of either of the section 207 applications would have a very substantial and material bearing upon their operations by depriving them of traffic which they are otherwise adequately transporting.

   b. In the absence of a showing by applicants in such section 207 applications by substantial evidence of a real and tangible need for the service such as is proposed, such applications must be denied.

8. a. The proposal of applicants in both the section 5 and section 207 applications is somewhat nebulous.

   b. The record does not establish the manner by which operations would be coordinated between the present operations of Strickland and Copperstate, on the one hand, and, on the other, the proposed operations.

   c. Strickland failed to establish the service which would be rendered by it between points involved in these applications and points presently served by it, nor as to the manner and method by which irregular routes would be conducted, if any.

   d. Copperstate established that as a result of the grant of its applications, it would introduce an all-highway service in lieu of the present rail substituted service in conducting operations between Baton Rouge-New Orleans and Houston via Lake Charles, and it gave general operating testimony with respect to its proposal westbound from proposed points to points on its existing routes, but no eastbound service.

   e. Copperstate did not specify the manner and method by which operations would be conducted, establish its proposed terminal points, nor otherwise give sufficient information upon which the ability of the carrier to conduct the proposed service may be tested.

   f. Accordingly, it is clear that neither applicant established its proposed plan of operations with sufficient specificity as to permit of a determination of its ability to conduct the proposed service or the effect which the grant of the applications under either section 5 or section 207 would have on the rendition of

adequate transportation service to the public or as to the effect of the grants on existing carriers.

9. a. The operating rights of England Transportation Co., Inc., were historically predicated upon fulfillment of a need for motor carrier service to and from New Orleans, where either the actual origin or the ultimate destination was a point in Louisiana, other than New Orleans.

b. The operating rights of England Transportation Company of Texas, Inc., were historically predicated upon a need for general commodity motor carrier service in the handling of ex-water shipments moving inbound to Houston, Tex., and thence outbound from Houston to Lake Charles and Shreveport, La., and to points in a specified area in Texas.

c. As a result of granting either or both of the section 5 applications herein, transferees proposed utilization of the involved operating rights for entirely different purposes than those for which such rights were originally granted and by virtue of which operations, to the extent of their utilization, have been conducted.

d. The grant of either (section-5) application will result in the involved operating rights being used for purposes foreign to their prior usage and the historical basis for their grant.

e. Accordingly, the grant of either section 5 application would result in the utilization of the involved operating rights in the performance of through service, totally foreign to the purpose of the original grant of such operating rights and their prior utilization and, accordingly, such proposals are contrary to the public interest and cannot be sanctioned in the light of the resulting adverse effect on protestants, existing motor carriers, and the resulting creation of new, through services not contemplated in the original grants of such operating rights.

10. a. The operations conducted by England Transportation Co., Inc., immediately prior to the grant of temporary authority to Strickland were, in fact,

operations conducted under the control of Strickland.

b. Its inbound and outbound tonnage over the Shreveport gateway was traffic solicited and/or controlled by Strickland, moved in Strickland-controlled equipment, and had no incidence of vendor control.

c. Such operations in the manner in which they were conducted resulted in dormancy of such operations as a matter of law. *Stewart—Investigation of Operations,* 87 M.C. C. 681, 697-8.

11. Immediately prior to the grant of temporary authority, the operations conducted by England Transportation Co. of Texas, Inc., between Houston-New Orleans, and between the same points after the grant of temporary authority by Copperstate, and by Strickland after the grant of temporary authority between Shreveport-Baton Rouge-New Orleans, has been under a plan of substituted service operations, and thereby there has been an abandonment of motor carrier operations over-the-highways by the involved parties. *Atchison, T. & S. F. R. Co.* v. *United States,* 244 F. Supp. 955, 16 FCC 81757 (D. Ct. N. D. Ill. August 20, 1965).

12. a. The abandonment of operating rights involved as a matter of law results in such operating rights being dormant and incapable of transfer under such section 5 applications without proof of need for the revitalization of such services.

b. Applicants failed to establish by the substantial evidence any real or substantial need for the revitalization of such abandonment of services and, accordingly, the section 5 applications must be denied.

13. a. The resulting dormancy in law and in fact is wholly unlike MC-F-7340, *Texas-Arizona Motor Freight, Inc.—Purchase (Portion)—Mid-Continent Freight Lines, Inc.* (Div. 3, November 29, 1961), Not Officially Reported, wherein a dormancy of operations had existed in vendor at a prior date, but there had been a revitalization thereof prior to the contract of sale involved.

b. Here, the dormancy as a matter of fact and law existed both prior and subsequent to the contract of sale, and there was no lawful revitalization sufficient to remove the involved rights from the stigma of dormancy.

14. a. The grant of the section 5 applications herein would result in an improper division of operating authority of vendors between vendees, and result in a duplication.

b. Since a duplication of operating rights would result in vendees, duplicate operating rights would be created, contrary to the public interest, and requiring denial of such section 5 applications.

15. a. Neither applicant established the reasonableness of the involved consideration in the respective section 5 applications.

b. Contrarily, the record affirmatively establishes that the consideration involved in each such transaction is excessive and unreasonable, and constitutes excessive payment for naked operating rights for the purpose of converting them to different purposes than those for which they were originally granted.

c. Accordingly, the excessive and unreasonable consideration renders the section 5 transactions as contrary to the public interest.

16. a. The grant of either of the section 5 and section 207 applications would have a material ill-effect upon the operations of protestants, existing carriers operating within the territory covered by the applications.

b. While existing carriers must bow in favor of public requirements, applicants failed to establish by substantial evidence herein any statutory requirement for the grant of the instant applications, or a real and substantial need for the proposed service, which would require the public interest in the maintenance of sound economic conditions in existing carriers to yield in favor of the creation of the resulting operating rights.

c. Accordingly, neither transaction has been shown to

be consistent with the public interest nor required by the public convenience and necessity.

17. Strickland acknowledges that it is performing regular route operations under irregular route authority and has declared its intention to continue such operations if its Sub-12 application is denied and its section 5 application approved.

18. Copperstate acknowledges that it is performing regular route operations under irregular route authority and has declared its intention to continue such operations if its Sub-21 application is denied and its section 5 application approved.

19. Copperstate acknowledges that it is performing operations under England of La.'s Sub-13 authority which involve transportation from points in the radial destination territory to and through points in the radial destination territory via New Orleans and has declared its intention to continue such operations unless their cessation is directed by this Commission.

20. Copperstate acknowledges that it is paying Strickland for the use of Strickland's authority from Lake Charles to Houston, and the Examiner concludes that no bona fide interchange of freight has been effected between Copperstate and Strickland at Lake Charles when the traffic has been transported by rail from New Orleans to Houston.

21. The Examiner concludes that no bona fide interchange of freight has been effected between Copperstate and the Southern Pacific Railroad at Lake Charles when the traffic has been transported by rail from New Orleans to Houston.

22. Copperstate has solicited at New Orleans general commodity traffic destined to Houston and beyond offering a through, single-line service.

23. Strickland's prior arrangement with England of Louisiana for the movement of Strickland's trailers between New Orleans and Shreveport did not constitute a bona fide interchange of freight between said carriers.

24. The arrangement identified in Finding and Conclusion 7, above was conducted in violation of sections 5(1), 216 and 217 of the Interstate Commerce Act.

25. The evidence requires a finding that Strickland and Copperstate each failed to establish fitness to provide the services proposed respectively in Docket No. MC-59680 (Sub-No. 142) and Docket No. MC-22167 (Sub-No. 21).

26. The evidence requires a finding that Strickland and Copperstate each failed to establish fitness to extend its operations under section 5 through the acquisition of additional operating rights as respectively proposed in Docket No. MC-F-8798 and Docket No. MC-F-8808.

27. No showing of public convenience and necessity was made that would warrant a conversion of the irregular-route authorities of the England companies being purchased by Copperstate to regular-route authority.

28. No showing was made that operations under the England companies' authority has gravitated to regular-route as distinguished from irregular-route operations.

29. There has been no testimony from public witnesses that would establish that a regular-route scheduled service is needed in lieu of the irregular-route service under the England companies' irregular-route authority.

30. No concrete plan of operation in connection with the authority sought in the applications was advanced by Copperstate.

31. No proof was made by Copperstate that the proposed service in point of time between the involved points was feasible or could be rendered by Copperstate.

32. There is no convincing evidence that the service proposed under the section 207 application of Copperstate would serve a useful purpose responsive to a public demand and need.

33. The present and future public convenience and necessity does not require the grant of the section 207 application of Copperstate.

APPENDIX L.

The following is a redescription of a portion of the irregular-route rights of England Transportation Co. Inc. (a Louisiana corporation), granted in No. MC-57946 (Sub-No. 3, which Strickland Transportation Co. Inc., would be authorized to acquire and retain under the findings in No. MC-F-8798:

General commodities, except household goods as defined by the Commission, class A and B explosives, commodities in bulk, and commodities requiring special equipment, over regular routes,

Between New Orleans, La., and Monroe, La., serving Monroe, the intermediate points of Bunkie, Alexandria, and Ruston, and the off-route points of Tate Cove, Bastrop and Sterlington, La., and points in their commercial zones as defined by the Commission, and the off-route point of England Air Force Base, all restricted to traffic moving from, to, or through New Orleans, and serving intermediate and off-route points within 10 miles of New Orleans, as follows:

From New Orleans over U. S. Highway 61 to junction U. S. Highway 190 at or near Baton Rouge, thence over U. S. Highway 190 to junction U. S. Highway 71, thence over U. S. Highway 71 to Alexandria, thence over U. S. Highway 165 to Monroe, and return over the same route.

From New Orleans to Alexandria as specified above, thence over U. S. Highway 167 to Ruston, thence over U. S. Highway 80 to Monroe, and return over the same route.

The above authority as acquired by Strickland Transportation Co. Inc., will be made subject to a restriction that it shall not be combined or joined with any other authority of

Strickland Transportation Co. Inc., for the purpose of providing single-line service (1) between points in the Memphis, Tenn., commercial zone as defined by the Commission, on the one hand, and, on the other, New Orleans and points within 10 miles of New Orleans, or (2) between points in the Shreveport commercial zone as defined by the Commission, on the one hand, and, on the other, points in the commercial zones of Monroe and those in the above-specified intermediate and off-route points which are north of a line beginning at the Texas-Louisiana State line and extending along U. S. Highway 90 to junction U. S. Highway 165 near Iowa, La., thence along U. S. Highway 165 to Kinder, La., thence along U. S. Highway 190 to junction U. S. Highway 90 and thence along U. S. Highway 90 to the Louisiana-Mississippi State line.

APPENDIX M.

The following is the authority recommended to be conditionally granted to Strickland Transportation Co. Inc., in No. MC-59860 (Sub-No. 142):

General commodities, except household goods as defined by the Commission, class A and B explosives, commodities in bulk, and commodities requiring special equipment, over a regular route,

Between New Orleans, La., and Shreveport, La., serving intermediate and off-route points within 10 miles of New Orleans,

From New Orleans over U. S. Highway 61 to junction U. S. Highway 190 at or near Baton Rouge, La., thence over U. S. Highway 190 to junction U. S. Highway 71, thence over U. S. Highway 71 to Shreveport, and return over the same route.

The above authority will be granted subject to the condition that it shall not be combined or joined with any other authority of Strickland Transportation Co., Inc., for the purpose of providing single-line service between points in the Memphis, Tenn., commercial zone as defined by the Commission, on the one hand, and, on the other, New Orleans and points within 10 miles of New Orleans.

APPENDIX N.

The following is a description of the ultimate operating authority to be held by Consolidated Copperstate Lines as a result of consummation of the transaction approved in No. MC-F-8808 and issuance of the authority conditionally granted to Consolidated Copperstate Lines in No. MC-22167 (Sub-No. 21):

General commodities, except household goods as defined by the Commission, class A and B explosives, commodities in bulk, and commodities requiring special equipment.

Regular Routes:

Between New Orleans, La., and Houston, Tex., serving the intermediate points of Baton Rouge and Lake Charles, La., the off-route point of New Iberia, La., and intermediate and off-route points within 10 miles of New Orleans unrestricted except as indicated hereinafter, and serving the intermediate point of Beaumont, Tex., restricted to delivery of eastbound traffic only, as follows:

From New Orleans over Interstate Highway 10 via Baton Rouge and Lake Charles, La., and Beaumont, Tex., to Houston, Tex., and return over the same route.

Irregular Routes:

(Authority as acquired from MC-57946 (Sub-No. 2).) From New Orleans and Plaquemine, La., to Thibodaux, Ponchatoula, and Hammond, La., and return, with no transportation for compensation, except as otherwise authorized, to New Orleans and Plaquemine.

Between New Orleans and Plaquemine, La.

(The portion of the authority acquired from No. MC-57946 (Sub-No. 3).)

Between New Orleans, La., and points within 10 miles of New Orleans, on the one hand, and, on the other, points in Louisiana *on* and south of a line beginning at the Texas-Louisiana State line and extending along U. S. Highway 90 to junction U. S. Highway 165 near Iowa, La., thence along U. S. Highway 165 to Kinder, La., thence along U. S. Highway 190 to junction U. S. Highway 90 four miles from the Louisiana-Mississippi State line and thence along U. S. Highway 90 to the Louisiana-Mississippi State line.

The above-described authority will be made subject to the conditions (1) that the regular-route authority shall not be combined or joined with the irregular-route authority for the purpose of providing service between points on the said regular route, on the one hand, and, on the other, points in Louisiana *on* or south of the line beginning at the Texas-Louisiana State line and extending along U. S. Highway 90 to junction U. S. Highway 165 near Iowa, La., thence along U. S. Highway 165 to Kinder, La., thence along U. S. Highway 190 to junction U. S. Highway 90 and thence along U. S. Highway 90 to the Louisiana-Mississippi State line, other than Plaquemine, Thibodaux, Ponchatoula and Hammond, La., and (2) that the authority granted by these regular route and irregular route operating rights shall be restricted against traffic moving from, to, or through points in Louisiana *north* of a line beginning at the Texas-Louisiana State line and extending along U. S. Highway 90 to 90 to junction U. S. Highway 165 near Iowa, La., thence along U. S. Highway 165 to Kinder, thence along U. S. Highway 190 to junction U. S. Highway 90 and thence along U. S. Highway 90 to the Louisiana-Mississippi State line.

APPENDIX D.

Service Date
March 14, 1968

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of March, 1968.

No. MC-F-8798

STRICKLAND TRANSPORTATION CO., INC.—PURCHASE (PORTION) —ENGLAND TRANSPORTATION CO., INC.

No. MC-59680 (Sub-No. 142)

STRICKLAND TRANSPORTATION CO., INC., EXTENSION— NEW ORLEANS

No. MC-F-8808

CONSOLIDATED COPPERSTATE LINES—PURCHASE (PORTION)— ENGLAND TRANSPORTATION CO., INC., AND ENGLAND TRANSPORTATION COMPANY OF TEXAS

No. MC-22167 (Sub-No. 21)

CONSOLIDATED COPPERSTATE LINES, EXTENSION— NEW ORLEANS

Upon consideration of the record in the above-entitled proceedings and of:

1. Applicants' petitions, filed September 25, 1967, for reconsideration of the report and order, 104 M. C. C. 297, decided July 31, 1967, including requests for reopening for the purpose of receiving evidence

tendered with the petitions, and for oral argument in support of the petitions;

2. Replies by protestants, (a) Arkansas-Best Freight System, Inc., (b) Gordons Transports, Inc., and Campbell Sixty-Six Express, Inc., (c) Ryder Truck Lines, Inc., (d) Central Freight Lines, Inc., Red Ball Motor Freight, Inc., and Saia Motor Freight Line, Inc., (e) Braswell Motor Freight Lines, Inc., and (f) Herrin Transportation Company.
3. Petition by Hill-Elliott, Inc., filed January 15, 1968, in No. MC-F-8798, that it be substituted as the person in control of Strickland Transportation Company, Inc., transferee; and

IT APPEARING, That except for editorial errors hereinafter corrected, the findings in the said report are in accordance with the evidence and applicable law; the petitions for reconsideration set forth no material facts or arguments in addition to those previously considered, nor adequate cause for reconsideration or further hearing; oral argument is not deemed necessary; and the petition to substitute parties would be mooted by denial of the application and petitions for reconsideration:

IT IS ORDERED, That the said report, 104 M. C. C. 297, decided July 31, 1967, be, and it is hereby, corrected as follows, said corrections to be reflected in the bound volumes of the Commission's reports:

a. Revise the last sentence of footnote 3 on page 304 to read as follows: "The lower court was reversed by the Supreme Court, in *American Trucking* v. *A. T. & S. F. R. Co.*, 387 U. S. 397, decided May 29, 1967."
b. Revise lines 1-10 of the last paragraph on page 319 to read as follows:

> While it is true that the district court in reviewing the *Piggyback Rules* case did express its view that a certificate to operate over the highways as a motor carrier did not authorize, nor was it

utilized by the use of, substituted TOFC service, we are not inclined to accept that interpretation in this context. Not only was the court's decision in the *Piggyback Rules* case reversed by the Supreme Court, but the right to utilize TOFC service for all or a portion of its lines-haul operations was expressly provided in Rule 4(e),[7] a rule which was not under attack in that reivew of the case.[8] More-

IT IS FURTHER ORDERED, That the said petitions, except the petition to substitute parties, be, and they are hereby, denied.

IT IS FURTHER ORDERED, That the petition to substitute parties be, and it is hereby, dismissed as moot.

IT IS FURTHER ORDERED, That the order of July 31, 1967, shall be effective 60 days from the date this order is served; and

IT IS FURTHER ORDERED, That the authority granted by the orders of September 30, 1964, in Nos. MC-F-8798 and MC-F-8808, as amended by orders of February 5 and 15, 1965, in No. MC-F-8798 and by order of February 15, 1965, in No. MC-F-8808, for temporary lease of the operating rights of England Transportation Co., Inc., and of England Transportation Company of Texas, shall be of no further force and effect at the expiration of 60 days from the date this order is served.

BY THE COMMISSION.

H. NEIL GARSON,
Secretary.

(SEAL)

IPREME COURT, U. S.

FILED
MAR 10 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1141

STRICKLAND TRANSPORTATION COMPANY, INC.,
Appellant,

—v.—

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ARKANSAS-BEST FREIGHT SYSTEM, INC., GORDONS TRANSPORTS, INC., BRASWELL MOTOR FREIGHT LINES, INC., RED BALL MOTOR FREIGHT, INC., and HERRIN TRANSPORTATION CO.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

DENNIS G. LYONS
1229 Nineteenth Street, N. W.
Washington, D. C. 20036
Attorney for Appellant

March, 1969

Of Counsel:

JOE A. KEITH
Sherman, Texas

W. T. BRUNSON
Oklahoma City, Oklahoma

ARNOLD & PORTER
Washington, D. C.

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Statutes and Rules Involved	4
Questions Presented	5
Statement	6
The Factual Background	6
The Proceedings Before the Commission.—The Application	11
The Examiner's Report	12
The Commission's Action	14
The Proceedings in the District Court	20
The Questions Presented Are Substantial	20
I. The Shreveport-New Orleans Rights and the Legality of the Interchange	24
II. The Monroe-New Orleans Rights	35
Conclusion	37
Appendix A—Order Affirming Decision of the Interstate Commerce Commission	1a
Appendix B—Order Denying (1) Motion to Amend Findings and (2) Motions for Injunction Pending Appeal	6a

PAGE

APPENDIX C—Commission Report, Dissent and Order .. 8a

APPENDIX D—Commission Order on Petitions for Reconsideration 41a

APPENDIX E—Statutes and Rules 44a

APPENDIX F—Sample Joint Tariff Notices 51a

APPENDIX G—Interchange Contract and Operating Procedures 53a

CITATIONS

CASES:

American Trucking Ass'ns, Inc. v. Atchison, T. & S.F.R. Co., 387 U.S. 397 (1967) 4, 8, 19

Baltimore & O.R. Co. v. Aberdeen & R.R. Co., 393 U.S. 87 (1968) 17

Braswell Motor Freight Lines, Inc. v. United States, 275 F. Supp. 98 (W.D. Tex. 1967), *aff'd*, 389 U.S. 569 (1968) 12

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) 4

C & H Transportation Co. v. United States, 249 F. Supp. 97 (N.D. Tex. 1965) 12

Deaton Truck Lines, Inc.—Purchase—Lavendar, 97 M.C.C. 256 (1964), *aff'd*, Alabama Highway Express, Inc. v. United States, 241 F. Supp. 290 (N.D. Ala. 1965), *aff'd*, 382 U.S. 106 (1965) 14, 21, 36

PAGE

Ex parte No. MC-43, Lease and Interchange of Motor Vehicles, 52 M.C.C. 675 (1951), *modifying* 51 M.C.C. 461 (1950) 22, 25, 27, 29, 30, 34

Ex parte 230, Piggyback Service, 322 I.C.C. 301 (1964), *rev'd in part,* 244 F. Supp. 955 (N.D. Ill. 1965), *but aff'd in whole, sub nom.* American Trucking Ass'ns v. Atchison, T. & S.F.R. Co., 387 U.S. 397 (1967) ..7, 8, 17, 29, 33

Gilbertville Trucking Co. v. United States, 371 U.S. 115 (1962) 4, 26, 28

Gordons Transports, Inc. v. Strickland Transportation Co., 318 I.C.C. 395 (1962), *aff'd,* 219 F. Supp. 618 (N.D. Tex. 1963) 7, 8

Midwest Emery Freight System, Inc. v. United States, 293 F. Supp. 403 (N.D. Ill. 1968) 21, 35

National Motor Equipment Interchange—Agreement, 305 I.C.C. 196 (1958) 30, 33

SEC v. Chenery Corp., 318 U.S. 80 (1943) 17

Strickland Transportation Co., Inc. v. United States, 293 F. Supp. 858 (C.D. Cal. 1968) 2

Strickland Transportation Co., Inc.—Control—England Transportation Co., Inc., 85 M.C.C. 549 (1960) 7

Strickland Transportation Co., Inc.—Louisiana Routes, No. MC-59680 (1958) 6

Strickland Transportation Co., Inc.—Purchase (Portion)—England Transportation Co., Inc., 104 M.C.C. 297 (1967) ..... *passim*

PAGE

STATUTES AND RULES:

28 U.S.C. § 1253 4

28 U.S.C. § 1336 2

28 U.S.C. § 1339 2

28 U.S.C. § 2101(b) 4

28 U.S.C. § 2284 2

28 U.S.C. §§ 2321-22 2

28 U.S.C. § 2323 3

28 U.S.C. §§ 2324-25 2

Interstate Commerce Act:

Section 1(4), 49 U.S.C. § 1(4) 29

Section 5, 49 U.S.C. § 5 ..... 4, 11, 12, 14, 16, 20, 21, 36

Section 15, 49 U.S.C. § 15 29

Section 207, 49 U.S.C. § 307 ..... 4, 11

49 C.F.R. Part 1057 (Formerly 49 C.F.R. Part 307) ..4, 15, 18, 26, 27, 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

STRICKLAND TRANSPORTATION COMPANY, INC.,

Appellant,

—v.—

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ARKANSAS-BEST FREIGHT SYSTEM, INC., GORDONS TRANSPORTS, INC., BRASWELL MOTOR FREIGHT LINES, INC., RED BALL MOTOR FREIGHT, INC., and HERRIN TRANSPORTATION CO.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

Appellant Strickland Transportation Company, Inc., of Dallas, Texas ("Strickland") appeals from the judgment of the United States District Court for the Central District of California, entered on December 2, 1968, and adhered to on January 27, 1969, upholding certain orders of a sharply-divided Interstate Commerce Commission which, in essence, disapproved Strickland's proposed purchase of two portions of the motor carrier operating rights of England Transportation Company of New Orleans, Louisiana ("England"). This Statement is submitted to show that this Court has jurisdiction over the appeal, and that

the questions presented are substantial and deserving of plenary consideration.

OPINIONS BELOW

The December 2, 1968, order of the three-judge District Court (constituting also its opinion) is reported at 293 F. Supp. 858. Copies of that order and of the District Court's January 27, 1969, order denying Strickland's timely motion for reconsideration and amendment of findings are appended hereto as Appendices A & B, respectively (pp. 1a to 5a and 6a to 7a, *infra*). The Report of the majority of the Interstate Commerce Commission ("Commission") disapproving Strickland's purchase and reversing a contrary Report and Recommended Order of the Commission's Hearing Examiner, and the dissent filed by four Members of the Commission who would have affirmed the Examiner, are reported as *Strickland Transportation Co., Inc.—Purchase (Portion)—England Transportation Co. Inc.*, 104 M.C.C. 297. Copies of the Report and of the dissent thereto, and of the Commission order then entered are attached as Appendix C (pp. 8a to 40a). A copy of the Commission's order on petition for reconsideration is attached as Appendix D (pp. 41a to 43a, *infra*).

JURISDICTION

This action was maintained by Strickland pursuant to 28 U.S.C. §§ 1336, 1339, 2284 and 2321-25, to set aside the orders of the Commission which disapproved Strickland's purchase of the rights which it had sought to acquire.[1]

[1] The action was originally filed by Consolidated Copperstate Lines, Montebello, California ("Copperstate"), to set aside other aspects of the same orders of the Commission. Strickland and Copperstate each had separately entered into an agreement with

Strickland's applications had been approved by the Hearing Examiner but disapproved by a sharply divided Commission, six to four.

Various motor carriers which had opposed the England transaction before the Commission intervened in support of the defendant Commission and the United States. On December 2, 1968, the District Court entered a judgment as part of a short *per curiam* opinion sustaining the Commission majority. On December 11, 1968,[2] Strickland timely filed a motion requesting the District Court to vacate its judgment, to amend its findings, to make certain additional findings, and for further relief. On January 27, 1969, the District Court denied Strickland's motion and adhered to its original decision. On February 4, 1969, on Strickland's application[3] Mr. Justice Harlan ordered that the Commission's December 12, 1968, order fixing February 10, 1969, as the termination date of Strickland's

---

England, or an affiliate of England, each to acquire a specified portion of the England operating rights. The two applications were consolidated before the Commission and were disposed of by it in a single report and through the same orders. Strickland's procedural position in the action below was technically that of an intervening plaintiff (28 U.S.C. §2323); it intervened after the Copperstate complaint was filed. Strickland's intervening complaint was restricted to seeking the setting aside of the portions of the Commission's orders which denied its own applications.

We are advised that Copperstate is also appealing to this Court from that portion of the order of the District Court which affirmed the Commission's action on its application. While the Strickland and Copperstate applications were disposed of in the same Commission proceeding and their judicial review proceedings below were determined together, the two cases do not raise common issues of fact or law.

[2] The Clerk of the District Court originally docketed this motion as filed December 30, 1968, but the District Court ordered this error corrected by *nunc pro tunc* order filed February 3, 1969.

[3] A similar application made to the District Court had been denied.

temporary authority to operate the England routes in question be stayed pending this Court's action upon Strickland's Jurisdictional Statement, which Mr. Justice Harlan required (as a condition of the stay) to be filed on or before March 10, 1969. Strickland on February 10, 1969, filed its Notice of Appeal in the District Court.

The jurisdiction of this Court to review the judgment of the District Court on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). Cases sustaining the jurisdiction include *American Trucking Ass'ns, Inc.* v. *Atchison, T. & S.F.R. Co.*, 387 U.S. 397 (1967), *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115 (1962), and *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962).

STATUTES AND RULES INVOLVED

Section 5 of the Interstate Commerce Act, 49 U.S.C. § 5, governs applications for Commission approval of transactions involving the acquisition of rights of one carrier by another. The statutory test is whether the transaction is "consistent with the public interest." Section 207 of the Act, 49 U.S.C. § 307, governs issuance of motor carrier certificates of public convenience and necessity. In 49 C.F.R. Part 1057, the Commission has promulgated rules relating to the lease and interchange of vehicles.[4] The pertinent parts of all these provisions are set forth in Appendix E (pp. 44a to 50a, *infra*).

[4] These rules were renumbered in December 1967. At the time of the proceedings before the Commission, they were found at 49 C.F.R. Part 307, and are so cited in the Commission's Report.

QUESTIONS PRESENTED

1. Did the Commission err in holding that the equipment interchange between Shreveport and New Orleans which England and Strickland had participated in for three years, involving the exchange of fully loaded trailers pursuant to an agreement whereby England was paid a flat sum per trailer for carrying the trailers between the two points, was unlawful, and hence that England's Shreveport-New Orleans route was constructively dormant?

2. Did the Commission err in declining to approve the purchase by Strickland of England's Monroe-New Orleans operating rights on the ground that the Hearing Examiner had *sua sponte* recommended the conversion of the irregular authority for which Strickland had applied to regular authority, and that the resulting regular authority—for which Strickland had not applied—was a "new service" requiring a fresh showing of public convenience and necessity to authorize its transfer?

3. Was Strickland deprived of essential procedural rights when the Commission rested its decision on factors not raised by the parties or previously considered in the proceeding and then denied Strickland any opportunity to respond to the new issues injected into the proceeding by the Commission's Report?

STATEMENT

The Factual Background.—On May 1, 1964, England, a common carrier by motor vehicle certificated to carry general commodities on irregular routes including New Orleans-Shreveport and New Orleans-Monroe, ceased operations due to labor difficulties, and on June 17, 1964, sold its operating rights and equipment at public auction. The successful bidder for the New Orleans-Shreveport and New Orleans-Monroe portions of those rights was Strickland, a long-line common carrier by motor vehicle of general freight between Eastern and Midwestern points, on the one hand, and New Orleans and various other Louisiana, Texas and Arkansas points, on the other.

The background of Strickland's interest in acquiring England's Shreveport-New Orleans and Monroe-New Orleans routes is as follows: In 1958, the Commission extended Strickland's operating authority into New Orleans over the protests of various carriers that the effect would be to authorize Strickland to serve in competition with them the New Orleans-Northeast market.[1] Strickland has direct authority to serve New Orleans itself from northeast and midwest points only over circuitous Texas routes, via Texarkana and either Dallas or Houston to New Orleans. Were Strickland able to serve New Orleans via Little Rock and Shreveport, points to which it is certificated, its route to New Orleans would benefit from a substantial saving in mileage.[2] Accordingly, in 1960 Strick-

---

[1] *Strickland Transportation Co., Inc., Extension—Louisiana Routes,* No. MC-59680 (1958); see Petition of Protestants for Reconsideration, especially Specification of Error No. 27, p. 60.

[2] Circuity would still exist, but to a lesser extent. The most direct route to New Orleans from the midwest traverses the State of Mississippi, which Strickland does not serve.

land applied for Commission approval of a proposed acquisition of the stock of England, whose rights between Shreveport and New Orleans would have ameliorated Strickland's circuity problem. The Commission withheld approval in the light of factors then present, but in so doing it stated plainly that the two carriers could combine operations over Shreveport, noting that "such a service could be inaugurated by the carriers at any time," *i.e.*, through interchange. *Strickland Transportation Co., Inc.—Control—England Transportation Co., Inc.*, 85 M.C.C. 549, 555 (1960).[3]

Strickland and England followed the Commission's suggestion, and commencing in the following year, 1961, inaugurated a coordinated service.[4] Strickland continued to

---

[3] The routes of Strickland, and those of England which Strickland contracted with England to acquire subject to the Commission's approval in the proceedings of which this appeal is part of the judicial review, are set forth on the map on page 9.

[4] In 1960 Strickland pursued an alternative means of alleviating its circuity problem. It negotiated an intermodal trailer on flatcar ("TOFC"), or "piggyback," arrangement with the Illinois Central Railroad ("IC"), which reduced transit time by a full day. In response to a protest from a competitor, Strickland desisted from that arrangement, pending adjudication by the Commission of its legality. In *Gordons Transports, Inc.* v. *Strickland Transportation Co.*, 318 I.C.C. 395 (1962), *aff'd*, 219 F. Supp. 618 (N.D. Tex. 1963), the Commission—over the strong dissents of four members—concluded that in light of the effect on competition and the then-current view that no motor carrier could participate in so-called "Plan III" TOFC, this particular TOFC arrangement was unlawful, although conceding that the whole matter of TOFC rules was under "comprehensive analysis" in a proceeding known as *Ex parte 230*. See 318 I.C.C., at 402. The Commission subsequently did clarify those rules, *approving* the Strickland-IC type of "Plan III" all-rail TOFC service, as well as joint intermodal or "Plan I" piggyback service, with loaded trailers moving by railroad on the motor carrier's bill of lading at regular motor carrier rates with all billing done by the motor carrier and the rail carrier's compensation determined by negotiation between the carriers. The Commission did impose, although

interline individual shipments with England over Shreveport, but—more frequently—commenced interchanging fully loaded trailers at Shreveport for delivery by England to New Orleans, and vice versa as to northern-bound shipments. This trailer-for-trailer interchange lasted until England ceased operations on May 1, 1964. It was well-publicized, well-known to the shipping public and to competitors, and heavily patronized—particularly by shippers in the Northeast. In 1963, for example, the interchange participants exchanged 2,071 loaded trailers, and between November, 1963, and April, 1964, 966. Examiner's Report ("Ex. Rep."), at 10.

When freight destined for New Orleans was accumulated in trailer lots at Strickland's break-bulk terminal in Little Rock, Arkansas, it was carried in a trailer sealed to control pilferage to Shreveport over Strickland's own route where it was exchanged, pursuant to agreement, for a trailer then in England's possession. England then carried the trailer over its own routes to Strickland's terminal in New Orleans, where the freight therein was broken down and

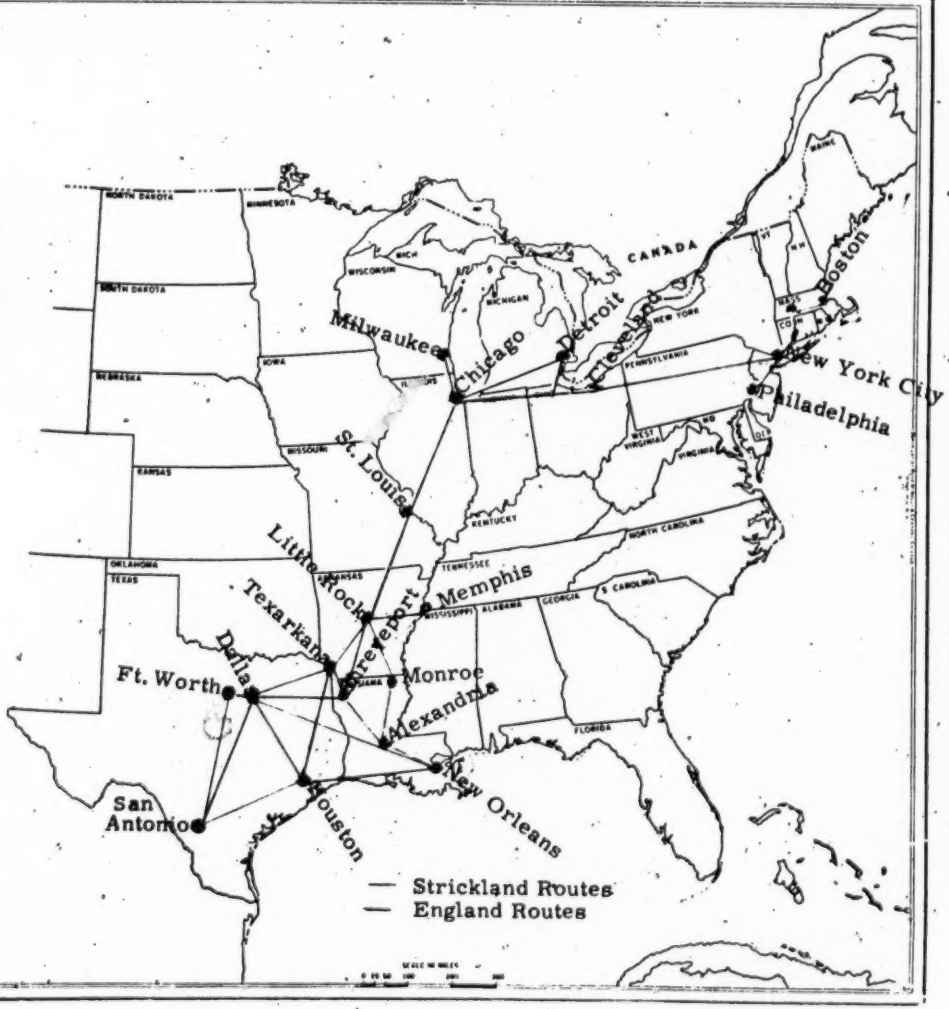
---

only prospectively, a circuity limitation (the saving in distance may not be more than 15%). See *Ex parte 230, Piggyback Service,* 322 I.C.C. 301 (1964), *rev'd in part,* 244 F. Supp. 955 (N.D. Ill. 1965), *but aff'd in whole, sub nom. American Trucking Ass'ns* v. *Atchison, T. & S.F.R. Co.,* 387 U.S. 397 (1967). In short, the Commission's own final TOFC rules sustained the views of the dissenters in *Gordons,* and would have validated the Strickland-IC Plan III joint intermodal piggyback arrangement had it not been cancelled as a result of the earlier litigation.

As the Commission frankly conceded immediately after citation to the *Gordons* case, "The information that we have received from the parties and the arguments which we have read and heard make it apparent that there are many differences of opinion as to the wisdom and the correct application of some of our past decisions." 322 I.C.C., at 323. In the circumstances, this can fairly be said to have been a virtual "confession of error."

For a general discussion of the types of TOFC plans, see this Court's opinion in *American Trucking Ass'ns* v. *Atchison, T. & S.F.R. Co., supra,* 387 U.S. 397.

This map shows in red Strickland's routes and in green the two England routes which Strickland applied to acquire.



distributed by Strickland under its unrestricted New Orleans rights which included local delivery rights. A similar procedure was followed at New Orleans respecting northbound traffic. As its share of the revenues on such shipments, England received first $125 per trailer; later, after a renegotiation between the carriers, $160 per trailer. With respect to the making of bills of lading for such shipments, Strickland, the originating carrier, cut a waybill when it received freight from the shipper. If it was determined at Little Rock (or at New Orleans with respect to northbound traffic) that the freight would be shipped via the Shreveport interchange, that routing and the identity of the interchange partner was rubber-stamped on the bill (Tr. 61, 548; see p. 60a, *infra*). Published tariffs relating to such shipments were amended to show use of the interchange, the interchange partners submitting jointly signed notices to the tariff publishers.[5]

Strickland's interest in acquiring the Monroe-New Orleans route[6] arose from the fact that Strickland was then scheduled to reacquire from a lessee—as it has now in fact reacquired—its own operating rights from Little Rock to Monroe. Use of the Monroe-New Orleans route provides an additional mileage saving on traffic between New Orleans and Midwest and Northeast points. During the time—1961 to 1964—that Strickland was interchanging equipment with England over Shreveport, England was

---

[5] Samples are attached as Appendix F (pp. 51a-52a, *infra*). Thus, except for the fact that, of course, two motor carriers rather than a motor carrier and a rail carrier were involved, the interchange arrangement precisely paralleled the pattern of Plan I Joint Intermodal TOFC arrangements approved by the Commission in 1964 and by this Court on judicial review in 1967. See n. 4, pp. 7-8, *supra*.

[6] The Monroe-New Orleans rights were offered at England's auction only as a "package" with the Shreveport rights.

conducting other operations between Monroe and New Orleans.

The Proceedings Before the Commission.—The Application.—When England ceased operations on May 1, 1964, and placed its equipment and operating rights for sale at public auction on June 17, 1964, Strickland was the high bidder with respect to the Shreveport and Monroe routes, having outbid several competitors—none of whom provide a direct service to the Northeast—who have since become protestants in the present proceeding. Pursuant to Section 5 of the Interstate Commerce Act, Strickland and England jointly applied for Commission approval of the purchase, Docket No. MC-F-8798. Strickland and England also filed a related application to convert the New Orleans-Shreveport route to regular authority,[7] Docket No. MC-59680 (Sub—No. 142), contingent on approval of the purchase application. On September 30, 1964, the Commission authorized Strickland to begin temporary operations over the Shreveport-New Orleans route pending decision upon its application, and on February 5, 1965, authorized temporary operations over the Monroe route. Since October 5, 1964, Strickland under this temporary authority has continuously conducted operations over the routes in question, making rental payments to England in the amount of $7,425 per month, which payments are

---

[7] A "regular" route is one restricted to specified highways or between fixed terminals, whereas "irregular" authority permits off-route service in a designated area. Section 207, 49 U.S.C. § 307, governs applications to convert irregular into regular authority, and Strickland proceeded thereunder with respect to the Shreveport-New Orleans route.

The Commission summarily denied the application to convert the New Orleans-Shreveport route when it denied the purchase application upon which the former was contingent. Strickland did not apply for conversion of the Monroe-New Orleans route.* Accordingly, there is no issue currently presented in this case as to whether there exists the public convenience and necessity to be shown for the conversion of an irregular route authority into a regular route authority.

to be credited against the purchase price of $495,000 in the event of final approval.

Extensive public hearings were held before the Commission's Examiner during 1965 relating to the Strickland purchases. The case was tried under the customary rubric in Section 5 motor carrier rights transfer cases that where the rights to be transferred are in active use and not "dormant" in the period prior to the application for their transfer, no new showing of public convenience and necessity for the operation of the route by the transferee need be made. See, *e.g., G & H Transportation Co.* v. *United States,* 249 F. Supp. 97, 99-100 (N.D. Tex. 1965); *Braswell Motor Freight Lines, Inc.* v. *United States,* 275 F. Supp. 98 (W.D. Tex. 1967), *aff'd,* 389 U.S. 569 (1968). On May 16, 1966, the Examiner issued a carefully documented Report and Recommended Order recommending approval of Strickland's application.[8]

The Examiner's Report.—The Examiner rejected the protests of various competing carriers that the routes in question had become dormant in fact, or were to be deemed constructively dormant on the theory that the interchange agreement between England and Strickland amounted to an unlawful pooling of traffic or revenues in violation of Section 5(1) of the Interstate Commerce Act.[9] In rejecting the charge of unlawful pooling, the Examiner noted that of the 13 protesting motor common carriers:

---

[8] In their brief to the District Court, the United States and the Commission conceded (p. 26) that "The Examiner's findings of fact and summaries are complete and accurate."

[9] The attack on the interchange as an unlawful pooling was made on the theory that since Strickland could have moved the traffic to New Orleans itself without interchange, via its circuitous route through Texas, the arrangement was an unlawful contract between competitors pooling their traffic. Ex. Rep. 14-17.

> "[M]any ... undoubtedly similarly (albeit unwittingly) participate in essentially similar arrangements and thus the pooling of traffic, revenues and services to some extent when conducting their own operations. It would be virtually impossible for them to conduct an efficient and economical motor carrier service without being able to surrender to local carriers shipments moving in line-haul service to points around their terminal points which they are also authorized to serve. Whether the protesting carrier is a long-line carrier or a local or distributing carrier, the practice is economical for the one and beneficial to the other. In fact, many distributing carriers depend heavily upon such traffic." Ex. Rep. 17.

The Examiner accordingly recommended approval of the acquisition by Strickland of the England New Orleans-Shreveport rights.

With respect to Strickland's application for approval of its purchases of England's irregular authority between New Orleans and Monroe, the Examiner found that England

> "... had an established service. ... England operated daily between New Orleans and Shreveport and also between New Orleans and Monroe. . . . Between New Orleans and Monroe it operated at least one vehicle regularly loading it at New Orleans during the day and running overnight to Monroe, but more often had two units in this service dispatching one in each direction each night." Ex. Rep. 21.

However, in the course of recommending approval of Strickland's acquisition of England's irregular New Or-

leans-Monroe route, the Examiner, on his own initiative and not in response to any application by Strickland,[10] concluded that the irregular authority which Strickland had purchased should be converted to regular authority, subject to certain operating restrictions.[11]

The Commission's Action.—On July 31, 1967, by a six-to-four vote, the Commission reversed its Examiner. As the Examiner had done, the Commission majority flatly rejected the grounds upon which the protestants challenged the Strickland purchases. It held that a brief lapse in service in 1964 and the circumstances of England's ceasing operations did not establish "actual dormancy." 104 M.C.C., at 314 (p. 25a, *infra*).

The Commission then turned to the question whether the Shreveport-New Orleans route should be deemed constructively dormant. Once again, it rejected the position of the protestants that the arrangement was an unlawful pooling under Section 5(1). Said the majority:

> "Protestants urge that the arrangement was either an unlawful pooling of traffic and services or an unlawful control by Strickland of the operations of England (La.). We do not agree that the arrangement was either of these things." 104 M.C.C., at 315 (p. 26a, *infra*).

---

[10] While an application to convert the Shreveport-New Orleans rights to regular route authority had been filed, no such application had been filed as to the Monroe-New Orleans rights.

[11] For his action, the Examiner cited recent precedent. ***Deaton Truck Lines, Inc.—Purchase—Lavendar,*** 97 M.C.C. 256 (1964), ***aff'd, Alabama Highway Express, Inc.*** v. ***United States,*** 241 F. Supp. 290 (N.D. Ala. 1965), ***aff'd,*** 382 U.S. 106 (1965). The case, however, simply holds that the Commission may condition the grant of a § 5 transfer application on a conversion of irregular route authority to regular..

Despite this, the majority concluded that the movement of Strickland trailers by England over its routes between Shreveport and New Orleans was "unlawful." The Commission suggested that the Strickland-England interchange had failed somehow to comply with the Lease and Interchange of Vehicles Rules, now 49 C.F.R. Part 1057. The precise basis for the majority's conclusion is not clear; the only specific citation to a rule of the Commission allegedly violated by the interchange was to a provision of Section 1057.5(c) (then Section 307.5(c)) of the Rules which requires that "the rates charged and the revenues collected must be accounted for in the same manner as if there had been no interchange of equipment. Charges for the use of the equipment shall be kept separate and distinct from divisions of the joint rates or the proportions thereof accruing to the carriers by the application of local or proportional rates." 104 M.C.C., at 316 (p. 27a, *infra;* see p. 49a, *infra*).

In addition, in the course of the Commission's discussion of the claimed illegality, the following matters were mentioned: (1) that England and Strickland "have not offered [in evidence] lease agreements covering such of Strickland's trailers as were used"; (2) that England was paid a flat charge per movement without regard to the weight or to the identity of the owner of the trailer; (3) that England "had no liability to the actual shippers"; (4) that England did not exercise "control or responsibility over the traffic"; (5) that most of the trailers involved in the interchange were owned by Strickland; (6) that England "cut no bills on the individual shipments nor was it shown as a connecting carrier on Strickland's bills, except that some of the bills issued by Strickland on shipments transported in this manner bore a rubber stamp

to show the routing." 104 M.C.C., at 315-16 (pp. 26a-27a, *infra*).[12]

The heart of the Commission's decision is at 104 M.C.C., at 317 (p. 28a, *infra*), where the majority said:

> "Whether this be pooling, interchange, or constructive control or lease by Strickland of the England (La.) rights, it was not authorized, not in compliance with our rules and regulations, and not lawful . . . . Appli-

---

[12] While the Commission's decision to reject the transfer of the Shreveport operating rights is clearly based on its conclusion of the illegality of the Strickland-England interchange, its report also in passing discusses certain allegedly unlawful cross-hauling by England during the period in question. 104 M.C.C., at 317; p. 28a, *infra*. The cross-hauling consisted of England's alleged use of its radial authority contained in a single certificate covering the movement of goods between various points and New Orleans, to move goods via New Orleans between the points outside through the base-point New Orleans. The Commission rejected the Examiner's conclusion that to the extent England had engaged in "cross-hauling," it was justified in doing so in reliance upon a letter dated September 2, 1961, from an official of the Commission's New Orleans field office which England construed as approving the particular traffic patterns involved.

The Commission conceded that it had frequently approved § 5 transfer applications despite "unlawful prior operations of vendor" where the vendee had not committed the violations, where there was color of right, where there was a public need for lawful future operations, or where all of these elements were present. A stricter view would, of course, result in the destruction of operating rights previously found to be required by the public convenience and necessity. In the present case the Hearing Examiner had held after examining the vendor's personnel that they had acted in reliance upon a letter from the Commission's local supervisor; the Commission knew of the practice, on relation of a competitor, but had taken no action; and the amount of cross-hauling was "small and insignificant." (Ex. Rep. 23) The record abundantly documents Strickland's extreme care to avoid cross-hauling. See Tr. 368-82, 502-04, 535-36.

While the Commission apparently placed some indeterminate weight upon the cross-hauling, it is clear that the focus of its rejection of the Shreveport application was its conclusion as to the illegality of the interchange. See 104 M.C.C., at 314-17,

cants admit that the arrangement described was novel. Such admission coupled with their failure to ascertain, even if they did not prove, the lawfulness thereof, adds an element of wilfulness. Such a conclusion is particularly significant since a previous effort by Strickland to find a short way to move traffic from the midwest to New Orleans had been found unlawful in the *Gordons-Strickland* complaint case. There (*sic*) speculative use of another 'novel' arrangement after that experience borders on foolhardiness." [13]

With respect to the Monroe-New Orleans route, the Commission majority concluded that England's operations over this route did not suffice to establish substantial use of the authority by England sufficient to support the transfer.

---

pp. 25a-28a, *infra*. If it erred in this conclusion, its orders cannot stand. Strickland is entitled to a decision by the Commission free of the effects of this error of law. See, *e.g.*, *Baltimore & O. R. Co.* v. *Aberdeen & R. R. Co.*, 393 U.S. 87, 91-92 (1968); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943).

[13] As will be explained below, not only does the Commission in its key statement of position incorrectly conclude that the interchange arrangement was an unlawful one, and not only does it improperly penalize Strickland for its participation in a railroad-motor carrier piggyback arrangement which four Commissioners at the time thought lawful and which was in principle later upheld by the Commission in *Ex Parte 230*, 322 I.C.C. 301 (1964), but the very premise of the Commission's statement—that Strickland knowingly employed a "novel" arrangement to solve its circuity problem—is erroneous as a matter of fact. As an examination of the record will reveal, no witness sponsored by Strickland so characterized the interchange arrangement, nor has Strickland so characterized the arrangement in any document filed in the administrative or judicial proceedings. The majority seems to have attributed to Strickland the characterization of "novel" which the *Examiner*, not Strickland, used at page 18 of his Report. We note that the Examiner's use of the word—which we believe to be inexact—must be read in light of his belief that the arrangement was entirely lawful and his understanding that many of the protestant carriers were engaged in the same practices (Ex. Rep. 17, p. 13, *supra*), which would seem to negate novelty.

For this conclusion the Commission cited two related reasons. First, there was the Examiner's unsolicited conversion of the irregular route authority at issue into a regular route authority, which act the Commission concluded deprived the protestants of an opportunity to object. Second, the Commission held that the grant of a transfer of *regular* route authority over this route would

> "... create a service which is so vastly different from the simple peddle service provided by England out of New Orleans that an entirely new and different service would be created, which could not but have an adverse effect on the existing competitive situation." 104 M.C.C., at 319 (p. 30a, *infra*).

The Commission never addressed itself to the actual application of the parties—namely, that England's *irregular* route authority to Monroe be transferred to Strickland.

The four dissenters, including then Chairman Tucker and present Chairman Brown, disagreed with the entire result reached by the majority, observing that

> "These cases are being decided, at least to a great extent, upon technicalities or issues not raised by the parties."

The dissenters noted that although the majority in rejecting the Shreveport application "relied heavily" upon its interpretation of Section 1057.5(c) (then 307.5(c)) of the Lease and Interchange Rules, which requires that "charges for the use of the equipment shall be kept separate and distinct from divisions of the joint rates," the majority had given "no thought" to Section 1057.5(a) (then 307.5(a)) of those same Rules, which provides that "the use to be made

of the equipment and the consideration for such use" shall be set forth in the interchange agreement. The dissenters noted that while the majority had "condemned" the applicants for failure to produce the "lease" agreement, "the fact of the matter is that no one asked them to do so." 104 M.C.C., at 327, p. 38a, *infra*.

Following announcement of the Commission's decision, Strickland filed a "Petition for Reconsideration and Oral Argument and to Reopen to Receive Tendered Evidence." Strickland there sought to correct some of the factual misconceptions which arose from the Commission's having decided the case on issues not raised before the Hearing Examiner. First, Strickland proffered copies of the trailer interchange contract and other documents which governed the interchange and which the majority unwarrantedly assumed did not exist.[14] (Pet. Recon. 10-11, Apps. 1, 5-48) Second, it was demonstrated that the record was replete with documents showing that where England participated in traffic via the Shreveport interchange, that fact was stamped on the waybill. Third, the identity of the person who had characterized the interchange as "novel" was clarified. And fourth, the majority's unwarranted assumption that England did not participate in claims arising out of the traffic was corrected; Strickland demonstrated that it had a contractual obligation to indemnify England for such claims, a common industry practice, approved by the Commission. On March 14, 1968, Strickland's Petition was denied.[15]

---

[14] The contract and certain documents setting forth interchange operating procedures are attached as Appendix G (pp. 53a-61a).

[15] The Commission did take the trouble to correct its opinion to reflect the fact that in the *American Trucking Ass'ns* case, 387 U.S. 397, decided on May 29, 1967, this Court had sustained—not struck down, as the Commission's report originally had it—the Commission's eventual approval of the kind of piggyback arrange-

The Proceedings in the District Court.—Pending disposition of Strickland's complaint in the District Court, its temporary authority to operate the routes in question was continued by that court. On December 2, 1968, the court entered a judgment sustaining the majority of the Commission. In a short *per curiam* decision, the court stated that in a Section 5 proceeding it could not penetrate behind "the wisdom and experience of the Commission" in ascertaining whether the transaction in question was "consistent with the public interest." The court held —and this is the sum total of its discussion or analysis of the issues in this case—that

> "The record of the proceedings establishes that the Commission's orders were based on substantial evidence and according to the applicable law. Plaintiffs in effect are asking this court to direct the Commission to be more lenient in its disposition, a position advanced by the four dissenting Commissioners. The case does not permit the court to be so motivated even if it were so disposed." (293 F. Supp., at 862; p. 5a, *infra*).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Strickland finds itself in an extraordinary predicament, the implications of which fully warrant plenary consideration by this Court. Having contracted to purchase England's Shreveport-New Orleans and Monroe-New Orleans operating rights, and having submitted the transaction for

---

ment which Strickland had initiated with the Illinois Central. Whether the author of the majority Report was led into error by this gross misconception as to the results of this Court's review of the piggyback rules, we do not know.

approval under Section 5, Strickland successfully repelled every challenge made to the transaction by protesting carriers in public hearings spread over 4,111 pages of transcript. The evidence and legal arguments there adduced convinced an able and experienced Hearing Examiner that the routes in question were not dormant prior to their purchase, and that these routes should not be deemed constructively dormant as having been operated in an unlawful pooling arrangement in violation of Section 5(1) of the Interstate Commerce Act. The protesting carriers advanced the same objections before the full Commission, and with no more success.

But without warning and without affording Strickland any opportunity to respond to the new legal issues or to clarify the factual matters which the Commission suddenly and unexpectedly had decreed to be relevant, a slim majority of the Commission, over the dissents of its then Chairman, its present Chairman, and two other members, ruled that the trailer-for-trailer interchange which Strickland and England had operated for nearly three years was in some not-clearly-defined way "unlawful."[1] The majority ignored the fact that in formal rule-making proceedings it had approved many of the practices now condemned. It also ignored the fact that the arrangement precisely paralleled the analogous pattern approved by the Commission and this Court for Plan I joint intermodal

[1] That lawfully interchanged or interlined traffic suffices to establish nondormancy in a § 5 proceeding to unify the rights into single-line service is not disputable, and was not disputed by the Commission here. See, *e.g.*, *Alabama Highway Express, Inc.* v. *United States*, 241 F. Supp. 290, 292-94 and n. 6, and 295 n. 11 (N.D. Ala. 1965), *aff'g Deaton Truck Lines, Inc.—Purchase—Lavendar*, 97 M.C.C. 256 (1964), *aff'd*, 382 U.S. 106 (1965), and cases there cited by the District Court; see also *Midwest Emery Freight System, Inc.* v. *United States*, 293 F. Supp. 403, 405-07 (N.D. Ill. 1968).

piggyback service—shipment of loaded trailers on flatcars under motor carrier tariff on through bills of the motor carrier, which does all the billing and compensates the railroad on a basis negotiated between the parties and which need not be published or even filed with the Commission. The majority apparently condemned the interchange on a number of grounds; but none of these apparent grounds has any basis in law or fact. Neither can any of these grounds be explained by reference to the policies underlying Commission regulation in this area;[2] indeed, the Commission pointed to no policy basis for its decision.

Moreover, the Commission sought to shore up its highly questionable conclusion with respect to the interchange by characterizing Strickland as a willful violator, guilty of a foolhardy disregard for the risks involved. Here, the majority relied on Strickland's prior application for permission to control England, which permission had been denied on grounds not relevant to the present proceeding; its Plan III piggyback service with the Illinois Central, which had been invalidated by a slim majority of the Commission (and before the Commission itself approved Plan III service generally); and Strickland's alleged but nonexistent concession as to the "novelty" of its interchange arrangement.

With respect to the irregular Monroe-New Orleans route whose purchase Strickland had submitted for approval, the Commission majority escalated the Hearing Examiner's unsolicited recommended conversion of that route into regular authority—which conversion the majority found to be improper—into a conclusion that that

[2] See *Ex parte No. MC-43, Lease and Interchange of Motor Vehicles,* 52 M.C.C. 675 (1951), *modifying* 51 M.C.C. 461 (1950), promulgating and explaining the rules governing interchanges.

regular authority (which Strickland had never sought) would constitute a "new" service as to which a showing of public convenience and necessity would have to be made. Lost in the shuffle was the clear evidence of record and the Examiner's unequivocal finding that England had validly and actively exercised its operating rights over this irregular route until it ceased all operations in 1964. (See Ex. Rep. 21, p. 13, *supra.*)

Strickland's prompt and vigorous efforts to correct the erroneous factual and legal premises underlying the majority's position were summarily rejected. Strickland was not even allowed to provide the Commission with a copy of the interchange agreement which it pleased the majority to assume did not exist, or to call the majority's attention to the thousands of through bills referred to in the record bearing designation of England's participation in the traffic routed over the Shreveport interchange, or to point out that it was the Examiner and not Strickland who had described the interchange as "novel."

Notwithstanding the favorable Examiner's Report, the sharp division within the Commission itself, and the unusually arbitrary and capricious nature of the majority's result, the District Court in a brief *per curiam* opinion merely recited the statutory scheme, listed the various conclusions of the Commission majority, and disposed both of Strickland's case, and of Copperstate's entirely different case, thus:

> "The record of the proceedings establishes that the Commission's orders were based on substantial evidence and according to the applicable law. Plaintiffs in effect are asking this court to direct the Commission to be more lenient in its disposition, a position ad-

vanced by the four dissenting commissioners. The case does not permit the court to be so motivated even if it were so disposed." (293 F. Supp., at 862; p. 5a, *infra*).

Strickland's timely request that the court make specific findings with respect to such key issues as the legality of the interchange was summarily denied.

Apart from the intolerable procedural predicament to which Strickland has been subjected by the Commission's unexpected attack on the legality of the interchange, and its indefensible use of the Examiner's unsolicited conversion of the New Orleans-Monroe authority into "regular" route authority as a basis for denying the application to transfer that authority, this case presents important questions of substantive law affecting the entire industry which should be resolved by this Court after plenary consideration. These issues relate to the legality of the New Orleans-Shreveport interchange—an interchange operated in complete conformity with the Commission's rules, in conformity with interchange principles established by the Commission in other cases, and, indeed, in many of the questioned respects in what appears to be the only practical manner in which to operate a motor carrier interchange.

I. *The Shreveport-New Orleans Rights and the Legality of the Interchange*

The key to the majority's disapproval of Strickland's acquisition of England's Shreveport-New Orleans operating rights was its conclusion that the route was constructively dormant between 1961 and 1964, in that the inter-

hange conducted during that period "was not authorized,[3] ot in compliance with our rules and regulations, and not awful." 104 M.C.C., at 317 (p. 28a, *infra*). With respect o the majority's repeated assertion that the Strickland-England arrangement "does not constitute interchange ithin the meaning of our rulings," [5] we note that the efinition of "interchange" advanced by the majority two entences later precisely describes the Strickland-England nterchange operation. There, the majority states that:

> ". . . interchange is a kind of interline [previously defined as the "practice whereby a carrier transfers a *shipment* to another carrier at a point of joint service for delivery or for further movement and later interline with another carrier"] which involves the exchange of equipment, here trailers but often tractors and trailers with or without drivers. Compare *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, 121. Usually interchange involves loaded vehicles, but in any form it is governed by the *Lease and Interchange of Vehicles Rules,* 49 CFR 307." (104 M.C.C., at 316; p. 27a, *infra*)

---

[3] The Commission's Rules do not impose any requirement that he Commission "authorize" specific motor carrier interchanges; his is a matter of private agreement.

[4] As developed in n. 12, pp. 16-17, *supra,* the Commission's iscussion of England's cross-hauling does not constitute an alterative basis for its decision capable of supporting it if its legal onclusion as to the lawfulness of the interchange is struck down.

[5] 104 M.C.C., at 316 (p. 27a, *infra*). Needless to say, the majority never attempted to identify the alleged rulings referred o, and it failed to cite *Ex parte No. MC-43, supra,* where the nterchange rules were promulgated and explained. As is noted elow, the Commission's opinion in *Ex parte No. MC-43* expressly nctioned many of the practices which the majority in the present se assumed without justification were "unlawful."

In *Gilbertville,* this Court defined interchange as a

> "... form of interlining whereby the two interlining carriers switch trailers at the point of transfer. An interchange is most common where the shipment involves a truckload quantity, and the exchange of trailers obviates the necessity of unloading the shipment from the trailer of the transferor and loading it on the trailer of the transferee. The trailer taken in exchange for the shipment-trailer may be either empty or loaded with an interline shipment in the other direction. A further form of interlining involves the use of a trip-lease for the transferee's leg of the journey. There the shipment-trailer is taken by the transferee, but no trailer is given in exchange; instead the transferor will lease the shipment-trailer to the transferee for the completion of the trip." 371 U.S., at 121 n. 2.

And the Commission's own Rules, 49 C.F.R. § 1057.2(c), p. 48a, *infra,* define an interchange of equipment as

> "The physical exchange of equipment between motor common carriers or the receipt by one such carrier of equipment from another such carrier, in furtherance of a through movement of traffic, at a point or points which such carriers are authorized to serve."

How these definitions exclude the Strickland-England arrangement is, to say the least, unclear.

Nor is the Commission's crucial but indefensible conclusion as to the alleged illegality of the interchange strengthened by its apparently critical enumeration of the alleged incidents of the arrangement. To consider them, one by one:

1. *The suggested absence of lease agreements.*—The majority attempted to make much of the fact that Strickland and England "have not offered lease agreements covering such of Strickland's trailers as were used." 104 M.C.C., at 316, p. 27a, *infra*. As the four dissenters noted, the applicants had never been asked to produce such a document, and in light of the issues before the Examiner, the question had never arisen. Moreover, promptly upon service of the Commission's Report, Strickland proffered a copy of the interchange agreement to the Commission, which declined to receive it. A copy of the document for whose alleged nonexistence the dissenters suggest Strickland was "condemned" is appended hereto in Appendix G, at pp. 53a-56a, *infra*. We note in passing that the Commission has never required the filing of such agreements with it. Indeed, at the urging of the Bureau of Motor Carriers, the Commission deleted from the leasing and interchange rules a proposed filing requirement. See *Ex parte No. MC-43, supra*, 51 M.C.C., at 527.

2. *The alleged improper basis of compensation between the carriers.*—The only alleged incident of the interchange which the majority even attempted to relate to any law, decision or regulation, and the only one explicitly declared to be sufficient to invalidate the interchange, was the agreement of the parties that England was to be compensated for its participation in the interchange traffic by a flat fee per trailer, which did not vary with the weight of the trailer or the identity of its owner. The majority suggested that this somehow violated Rule 307.5(c) (now 1057.5(c)).[6] As the four dissenters noted, this position overlooks Rule 307.5(a) (now 1057.5(a)), p. 48a, *infra*, which simply pro-

[6] Which provides that "charges for the use of the equipment shall be kept separate and distinct from divisions of the joint rates or the proportions thereof accruing to the carriers by the application of local or proportional rates." (p. 49a, *infra*)

vides that the "contract, lease, or other arrangement providing for interchange" shall describe the "use to be made of the equipment, and the consideration for such use." To some extent, the Commission majority also seems to suggest that there was a procedural deficiency in the basis on which the payments between the carriers were to be made, in that separate charges should have been established (a) for the rental of equipment, and (b) with respect to the division of the revenues for moving the freight.

In the Strickland-England arrangement, the consideration for the use of the interchanged equipment was fixed as the furnishing of a substitute trailer which the party giving up the first trailer in the interchange would then have a right to use. (See p. 55a, *infra*) The arrangement between the interchange participants was that whenever one party surrendered a trailer into the possession of the other, the receiving party was required to surrender into the possession of the first carrier a substitute trailer which that carrier would have a right to use.

The provision of the rules relied on by the majority on its face applies only when there is to be a debit or credit equipment position, requiring monetary compensation for the equipment use—as in the "trip-lease" procedure discussed by this Court in *Gilbertville*. (See p. 26, *supra*) Where there is such monetary compensation, it is to be separately stated from the agreed division of freight revenues. But here there was to be no equipment debit or credit position. No provision of law requires the transfer of possession of interchange equipment to be compensated for on a monetary basis. Indeed, in the passage from *Gilbertville* quoted above (p. 26), this Court recognized the "trailer-for-trailer" exchange procedure as an alternative to a trailer lease. The compensation here was the surrender of another trailer, so that each party possessed its

original number of trailers at all times. Since there was no money "charge for the use of the equipment," there was nothing to "keep separate" from the "divisions of the joint rates." Or, to put it another way, the consideration for the use of the trailer equipment—exchange of another trailer—was in fact separately stated from the "division of the joint rates" ($125, later $160 per movement). No provision of the interchange rules speaks to the question of the consideration to be exacted, either for use of equipment or for participation in carrying traffic.

As to the Commission's apparent strictures on the flat fee per movement basis of payment to England as compensation for its movement of the freight, it should be noted that in promulgating the rules in 1951, the Commission declined to prescribe a mode of compensation, except that it *prohibited* basing compensation on a percentage division of revenues. 52 M.C.C., at 722, 726. The earlier Division 5 opinion had sharply *criticized* using tonnage as a basis. 51 M.C.C., at 528. The Commission's present suggestion that a flat per-movement fee for the division was improper and that a percentage division would be preferable, or that the tonnage in the trailers should be determinative, is, accordingly, surprising. Moreover, we note here that in *Ex Parte 230, supra,* 322 I.C.C., at 328, 350-51, 375, the Commission explicitly held that divisions of rates involving carriers[7] are matters of private contract, and it declined to place any limitation or impose any particular

[7] Other than divisions purely between rail carriers, which are obligatory and governed by statute. 49 U.S.C. §§1(4), 15. In an all-rail situation, rail carriers are, by the cited provision, statutorily required to establish through routes and rates and to establish just and equitable divisions between themselves. There is no similar provision of the statute requiring interchange between motor carriers or between motor carriers and rail carriers; when such interchanges are effected on a voluntary basis, the divisions are a matter of negotiation between the participants.

form upon them—such as the Commission's unprecedented suggestion here that the fee must vary with weight and ownership—or to require that they be filed. Finally, the rules and regulations of the National Motor Equipment Interchange Association, agreement as to which was approved by the Commission in *National Motor Equipment Interchange—Agreement,* 305 I.C.C. 196 (1958), contain no such requirement, and indeed contemplate charges unrelated to weight or ownership.

3. *The ownership of the trailers.*—No more useful is the majority's suggestion that the interchange here was somehow faulty, in that most of the trailers interchanged were "owned" by Strickland, and that England's own trailers were absorbed into the flow of interchanged trailers. Here, the majority is unable even to refer to any statute, regulation or decision to justify its view that an interchange partner can only surrender his own trailers and must "own" half of all of them in service. The fact is that none of the Commission's own regulations, and none of its decisions or those of the courts, impose any such requirement. On the contrary, in promulgating its rules, the Commission in 1951 expressly *rejected* its Examiner's proposal that interchange agreements be confined to "owners" of the equipment involved, noting that in many instances the equipment might even belong to a third party. It was enough, indicated the Commission, that the interchange partner have "legal possession." *Ex Parte No. MC-43, supra,* 52 M.C.C., at 720-21. Compare proposed Rule IVa, 52 M.C.C., at 735, with the rules as promulgated.

Here, the parties' arrangement was that wherever Strickland gave up a trailer into England's possession, England gave one up into Strickland's possession. The trailers so given up were trailers in the lawful possession

of the party giving them up and which the recipient would have a right to use. Thus, for example, if England at the start of the arrangement had 25 trailers and Strickland 100, at all times thereafter, England would have 25 trailers and Strickland 100. Naturally, because of the disparity in size between the participants, the trailers being exchanged, as a statistical matter, in the majority of cases once the interchange began operating, would be trailers to which Strickland had title.

The apparent suggestion of the majority that trailer exchanges should be effected only as between a trailer *owned* by the first party, on the one hand, and *owned* by the second party, on the other, not only contradicts the position taken on the promulgation of the rules, but is plainly unworkable. In the first place, no two participants in an interchange are likely to have identical numbers of trailers; but unless this were the case, it would be difficult to comply with the Commission's new apparent requirement. In the second place, even if the two participants had approximately equal numbers of trailers to start with, a long-line carrier like Strickland would, in the nature of things, quickly absorb all of the equipment of a short-haul carrier like England, and before the short-haul carrier's equipment would return from distant destinations, all of the trailers being exchanged would be the long-line carrier's. We assume that the Commission does not intend to bar interchanges between partners of different sizes, or between those whose routes are unequal in size. Yet such is the import of its position, unless, as appears, it is simply an impermissible *ad hoc* declaration of illegality as to the parties here.

4. *The erroneous assumptions as to the through bills.* The majority's belief that only "some" of Strickland's through bills bore indicia of England's participation, and

that in any event the arrangement was somehow unlawful because England failed to cut bills itself respecting the interchange, is simply mistaken. Copies of all of the through bills issued in connection with the interchange were made available at the hearing, and the record, by review of the bills and lengthy cross-examination, is clear that virtually all of such bills had been stamped to indicate England's participation. (Tr. 59-61, 494-95, 561-63) As explained above (Statement, p. 10; see also p. 60a, *infra*), the stamp was applied only when it was once ascertained that the shipment would in fact be carried over the interchange. On southbound shipments, this decision was normally made at Little Rock. On shipments not routed over the interchange, no stamp was applied. Moreover, where England was itself the originating carrier and dealt directly with the shipper, it did cut its own bills. The record well may contain copies of a few bills on interchanged shipments which bear no stamp. But these bills must be stamped by hand, in nine copies; it would be incredible were there not some human errors.

In any event, the majority's contention that the non-originating carrier in an interchange must cut its own bills (even though it has no direct contact with the shipper, who may be thousands of miles away and has already paid the originating carrier for the total shipment) has no basis in law. Indeed, the only regulation cited by the majority in connection with the interchange, 49 C.F.R. §1057.5(c), expressly requires that

> "The traffic transported in interchange service *must move on through bills of lading issued by the originating carrier. . . .*" (Emphasis supplied)

This is precisely what was done here. The Commission's rules with respect to Plan I joint intermodal piggyback service, the piggyback equivalent and "carbon copy" of the Strickland-England interchange, have an identical provision. Moreover, in *Ex parte 230, supra,* 322 I.C.C., at 359, the Commission held that, absent an express shipper's direction, the originating carrier need not make its decision whether to use an interchange at the time of receipt of the shipment but may do so later, as did Strickland here at its break-bulk terminal at Little Rock.

5. *The alleged nonliability of England to shippers.*— The assertion that the interchange was unlawful because England allegedly "had no liability to actual shippers" is so far out of accord with the statute and the Commission's own rulings in this area as in itself to raise questions about the soundness of its decisional process here. No arrangement between the parties could discharge either of them from their statutory duties to the public; and none purported to do so.

What the parties agreed here was that Strickland would indemnify England with respect to any shipper claims arising out of England's operations under the interchange. The practice of one interchange participant indemnifying another is one common in the industry and one whose validity has been recognized by the Commission. *Ex parte 230, supra,* 322 I.C.C., at 347; *National Motor Equipment Interchange—Agreement, supra,* 350 I.C.C., at 200. Moreover, since England was essentially a "bridge" carrier and the traffic moved over England's routes in sealed trailers, the practicalities of the matter were that if any damage were done to the shipments, it was in point of fact Strickland's responsibility, since it assembled and de-

livered the shipments. The indemnification agreement thus simply reflected the practicalities of the matter and made Strickland responsible to assume the adjustment and defense of claims.

6. *The alleged failure of England to control the traffic.* —Finally, with respect to the claim that England somehow failed to exercise "control or responsibility" over the interchanged traffic, it is impossible to see how England's role differed from that of any other "bridge" carrier in an interchange. Its role was to check the equipment received to insure that it complied with the agreement, and to carry the trailer from one point to another over its routes, delivering it in good condition. England utilized its own tractors, drivers, safety inspectors and office personnel; it maintained and operated its own tractor terminals; all of its employees were solely responsible to it; and its drivers transported the interchanged trailers solely over its own certificated routes. There is nothing else a bridge carrier could or should do. The Commission has made no suggestion as to what else England should have done.

* * * * *

The majority's position—central to its rejection of the Shreveport-New Orleans application—that the interchange was unlawful is, accordingly, completely without basis in fact or law. Moreover, in a number of respects, it runs afoul of carefully considered positions taken by the Commission itself after elaborate rule-making procedures in 1950 and 1951, and is wholly inconsistent with the liberal purpose underlying the interchange rules.[8] The majority's

[8] In *Ex parte No. MC-43, supra,* 51 M.C.C., at 530, Division 5 noted its "belief that interchange between common carriers, in

contention that the interchange was unlawful reduces itself to little more than endless reiteration of a legal conclusion designed to reach a specific result; and that conclusion is without foundation. Since the Commission's decision turns on a question of law, it is judicially reviewable. Because of the grossly erroneous conclusion of the Commission, and the shadow it casts upon common motor carrier interchange practices formally approved by the Commission, plenary consideration by this Court would be indicated, even apart from the manifest procedural irregularities inflicted upon Strickland.

II. *The Monroe-New Orleans Rights*

Much less need be said at this point about the Commission's conclusion that although the Hearing Examiner erred in *sua sponte* converting the authority between Monroe and New Orleans into regular authority, it could not approve the purchase of such regular authority because it would create a new and different service as to which a public convenience and necessity must be shown. Strickland contracted to purchase irregular authority between Monroe and New Orleans and sought to have that purchase approved. To date, the Commission has not passed upon Strickland's application, choosing instead to reject purchase of the authority as converted—erroneously, it says—by the Examiner. Whether or not regular authority on this route would constitute a new service, the fact is that the record supports the Examiner's finding that the Monroe-New Orleans route was not dormant at the time

---

order to promote through movement of traffic without unloading, where feasible should be encouraged." See also *Midwest Emery Freight System, Inc.* v. *United States*, 293 F. Supp. 403, 407 (N.D. Ill. 1968).

of the purchase, there is nothing in his Report or in that of the Commission to suggest that purchase of irregular, as opposed to regular, authority would create a new and different service, and, accordingly, Strickland is entitled to have its application approved.[1]

While the Commission's handling of the Monroe-New Orleans application does not present issues of the industry-wide significance which its declaration that the Shreveport-New Orleans interchange was unlawful does, the patent procedural irregularity of the Commission's action, sanctioned without critical examination by the District Court, should be reviewed by this Court on appeal, together with the other issues presented.

---

[1] The Examiner ordered the England irregular route authority between New Orleans and Monroe converted to regular route authority as a condition upon approval of the Section 5 application, under the authority of *Alabama Highway Express, Inc.* v. *United States*, 241 F. Supp. 290 (N.D. Ala. 1965), *aff'g Deaton Truck Lines, Inc.—Purchase—Lavendar*, 97 M.C.C. 266 (1964), *aff'd*, 382 U.S. 106 (1965). That case indeed holds that incident to approving a Section 5 application the Commission may impose as a condition the conversion of certain of the authorities in question. However, no case upholds the Commission's action, once the Examiner has recommended such a condition upon approval, in denying approval of the application conditioned as recommended by the Examiner, while refusing to pass upon the application as actually filed. The difference is that in one case the Commission passes on the application as filed—and determines to grant it only subject to a condition—while in our case it has not passed upon it.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted,

DENNIS G. LYONS
1229 Nineteenth Street, N. W.
Washington, D. C. 20036
Attorney for Appellant

March, 1969

Of Counsel:

JOE A. KEITH
Sherman, Texas

W. T. BRUNSON
Oklahoma City, Oklahoma

ARNOLD & PORTER
Washington, D. C.

APPENDICES

APPENDIX A

Order Affirming Decision of the Interstate Commerce Commission

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
Civil No. 68-575-F
[Entered Dec. 2, 1968]

CONSOLIDATED COPPERSTATE LINES,
Plaintiff,

—v.—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants,

STRICKLAND TRANSPORTATION CO., INC.,
Plaintiff in Intervention.

Before BROWNING, *Circuit Judge,* and BYRNE and FERGUSON, *District Judges.*

PER CURIAM:

This is an action under 28 U.S.C. §§1336, 1398, 2284, 2321-2325 to annul and set aside orders of the Interstate Commerce Commission. The report and orders of the Commission, dated July 31, 1967, are published at 104 M.C.C. 297, and amended by order of March 4, 1968.

Primarily involved are the purchases of operating rights of two companies, England Transportation Company, a Louisiana corporation, and England Transportation Com-

pany of Texas, a Texas corporation. These two companies ceased operations in 1964 due to failure to consummate a new labor agreement, and they placed their operating authority and equipment for sale at public auction. The plaintiffs, Consolidated Copperstate Lines and Strickland Transportation Co., Inc., were two successful bidders.

The statutes involved are §§5(2)(a)(i), 5(2)(b), 207 and 210a(b) of the Interstate Commerce Act [49 U.S.C. §§5(2)(a)(i), 5(2)(b), 307 and 310a(b)].

Section 5(2)(a) provides the basic permissibility for carriers to acquire control of other carriers.

Section 5(2)(b) sets forth procedures and standards for Commission approval of such transactions.

Section 207 provides for the grant of a certificate authorizing common carrier operation upon suitable findings of the public convenience and necessity.

Section 210a(b) provides for the issuance of temporary authority for one motor carrier to operate or lease the rights of another carrier.

In its §5 purchase application, Copperstate sought to obtain through the purchase of a portion of the rights of England Transportation Company of Louisiana (England, La.), and England Transportation Company of Texas (England, Tex.), more direct routes from its western and southwestern service territory to points in Texas and to penetrate the New Orleans, Louisiana, service territory by providing service between New Orleans and Houston, Texas. Copperstate also filed an application for authority under §207 for an extension of the rights it sought to acquire.

By its §5 purchase application, Strickland sought to obtain through the purchase of England (La.) a competitive, direct north-south route between its present east

and northern service territory, on the one hand, and, on the other, New Orleans—from Texarkana, Texas, through Shreveport, Louisiana. Also, in a §207 application, Strickland sought to convert a portion of the England (La.) rights from irregular-route authority to regular-route authority.

Temporary authority to operate the rights of the England Companies was granted by the Commission in September 1964 and both Strickland and Copperstate commenced operation the following month.

Both Copperstate and Strickland sought approval before the Commission and were given temporary authority to operate under the England rights pending final order of the Commission. The hearing examiner recommended, generally, approval of the applications, but the Commission, with four dissenters, denied the applications. In reversing the examiner's recommendation, the Commission, upon substantial evidence, found (1) that both Copperstate and Strickland were relying on past operations unlawfully performed by the England Companies in violation of the terms of their certificates, (2) that to the extent such past operations had been unlawfully performed, they would not be considered as probative of the public interest, (3) that both Copperstate and Strickland, as well as the England Companies, had performed so-called cross-hauling in violation of their certificates, (4) that Strickland had unlawfully managed and controlled certain rights of England (La.) prior to the Commission's approval of the temporary lease arrangement, (5) that both purchase proposals were so different from that service lawfully rendered as to constitute a new service for which the public convenience and necessity must be proved, (6) that neither carrier had borne its burden of proof in showing

a need for the new services, and (7) that neither Strickland nor Copperstate was entitled to any special consideration under the doctrine of color-of-right or because of an overriding public interest.

Before the Commission's orders became effective, this action was filed. A temporary injunction and interlocutory judgment have stayed the effective date of the Commission's orders. We now conclude that the Commission's orders should be upheld.

In a §5 application proceeding, the burden is upon the applicant to show that a new service will not be created. The applicant must show both (1) that the prior operations were not dormant and (2) that the use to which the purchased rights would be put would not radically differ from their prior use. *Braswell Motor Freight Lines, Inc.* v. *United States,* 275 F. Supp. 98 (W.D. Tex. 1967), *aff'd per curiam,* 389 U. S. 569, *rehearing denied,* 390 U. S. 975 (1968).

If the Commission finds under a §5 proceeding that the rights to be purchased were dormant or a new competitive service created, or that the vendor was selling more rights than he had, then the applicant must present proof under a separate §207 application that the public convenience and necessity require the granting of the application.

The test of court review of the Commission's actions is the same in a §5 as in a §207 proceeding. In a §207 proceeding, the test is "It [the reviewing court] cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law". *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U. S. 515, 536 (1946). In a

§5 proceeding "'the wisdom and experience of the Commission', not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest'. . . . If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order". *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 87-88 (1944).

The plaintiffs' attack against the Commission's decision is bolstered by the fact that the hearing examiner and four of the commissioners would grant the applications. This circumstance, however, does not permit this court to vary from the established rules of judicial review.

The Commission considered all four applications in one report and order. As a result, the report, being one document, did not separate item by item the findings in regard to each application. This method of drafting its report certainly cannot be fatal to the Commission's orders. Form does not govern substance, and the Commission's findings in the §207 proceedings are fully applicable to the same issues in the §5 matters. A study of the Commission's report requires the conclusion that its discussion rationally segregates and disposes of all issues raised in each proceeding.

The record of the proceedings establishes that the Commission's orders were based on substantial evidence and according to the applicable law. Plaintiffs in effect are asking this court to direct the Commission to be more lenient in its disposition, a position advanced by the four dissenting commissioners. The case does not permit the court to be so motivated even if it were so disposed.

IT IS ORDERED that the decision of the Commission be, and the same is, affirmed.

APPENDIX B

Order Denying (1) Motion to Amend Findings and (2) Motions for Injunction Pending Appeal*

IN THE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Civil No. 68-575-F

[Entered Jan. 27, 1969]

CONSOLIDATED COPPERSTATE LINES,

Plaintiff,

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants,

STRICKLAND TRANSPORTATION CO., INC.,

Plaintiff in Intervention.

Before:

BROWNING, *Circuit Judge,*
and BYRNE and FERGUSON, *District Judges.*

PER CURIAM:

The following motions having been duly submitted for decision pursuant to a Stipulation and Order filed December 30, 1968:

---

* As corrected by order *nunc pro tunc* filed February 3, 1969.

(1) Motion of Consolidated Copperstate Lines, filed December 30, 1968, for an injunction pending appeal to stay the Orders of the Interstate Commerce Commission;

(2) motion of Strickland Transportation Co., Inc., filed December 11, 1968, to amend findings and make new findings; and

(3) motion of Strickland Transportation Co., Inc., filed December 30, 1968, for an injunction pending appeal,

IT IS ORDERED that the above-described motions are denied.

IT IS FURTHER ORDERED that the clerk this date serve copies of this order by United States mail upon the attorneys for the parties appearing in this action.

APPENDIX C

Commission Report, Dissent, and Order

Served August 15, 1967

MF-3010

INTERSTATE COMMERCE COMMISSION

No. MC-F-8798[1]

STRICKLAND TRANSPORTATION CO., INC.—PURCHASE (PORTION)—ENGLAND TRANSPORTATION CO., INC.

Decided July 31, 1967

1. In No. MC-F-8798, purchase by Strickland Transportation Co., Inc., of certain of the operating rights of England Transportation Co., Inc., and acquisition by L. R. Strickland of control of the operating rights through the purchase, denied.
2. In No. MC-59680 (Sub-No. 142) public convenience and necessity found not shown to require operation by Strickland Transportation Co., Inc., as a motor common carrier, over a regular route, between Shreveport and New Orleans, La. Application denied.
3. In No. MC-F-8808, purchase by Consolidated Copperstate Lines of certain of the operating rights and property of England Transportation Co., Inc. and the operating rights of England Transportation Company of Texas, and acquisition by Horace W. Steele, Service Tank Lines, Cornel G. Allen, and Walter B. Allen of control of the operating rights and property through the purchase, denied.
4. In No. MC-22167 (Sub-No. 21) public convenience and necessity found not shown to require operation by Consolidated Copperstate Lines, as a motor common carrier, over a regular route, between Houston, Tex. and New Orleans, La. Application denied.

David Axelrod, W. T. Brunson, R. Douglas Coffin, and *Leonard R. Kofkin* for applicants.

M. Ward Bailey, Louis I. Dailey, Bob W. Fleming, Charles R. Ford, Jr., William F. Goodwin, Leroy Hallman, Rollo E. Kidwell, Charles D. Mathews, Hugh T. Matthews, Oscar P. Peck, Reagan Sayers, R. Y. Schureman, Mert Starnes, and *Phineas Stevens* for protestants.

A. R. Allen for intervenor

REPORT OF THE COMMISSION

[1]This report also embraces Nos. MC-59680 (Sub-No. 142), Strickland Transportation Co., Inc., Extension—New Orleans; MC-F-8808, Consolidated Copperstate Lines—Purchase (Portion)—England Transportation Co., Inc., and England Transportation Company of Texas; and MC-22167 (Sub-No. 21), Consolidated Copperstate Lines, Extension—New Orleans.

TUGGLE, *Commissioner:*

Exceptions were filed by certain protestants to the report and recommended order of the hearing examiner to which all applicants replied. Our conclusions differ from those of the examiner.

By joint application in No. MC-F-8798, filed July 1, 1964, Strickland Transportation Co., Inc., hereinafter called Strickland, of Dallas, Tex., and England Transportation Company, a Louisiana corporation, hereinafter called England (La.), of New New Orleans, La., seek authority under section 5 of the Interstate Commerce Act for the purchase by the former of certain of the operating rights of the latter for $495,000. By the same application, L. R. Strickland, also of Dallas, who controls Strickland through ownership of a majority of its capital stock, seeks authority under the same section to acquire control of the said operating rights through the purchase.

By another application in No. MC-59680 (Sub-No. 142), filed December 7, 1964, as a matter directly related to the application in No. MC-F-8798, Strickland seeks authority under section 207 of the act to convert a portion of the operating rights sought to be acquired from irregular-route to regular-route operations, as hereinafter further explained.

By a second joint application, in No. MC-F-8808, filed July 7, 1964, Consolidated Copperstate Lines, a California corporation, hereinafter called Copperstate, of Montebello, Calif., England (La.), and England Transportation Company of Texas, a Texas corporation, hereinafter called England (Tex.), of Houston, Tex., seek authority under section 5 of the act for the purchase by Copperstate of certain of the operating rights and property of England (La.) and all of the operating rights of England (Tex.) for a total of $400,000. By the same application, Horace W. Steele, Service Tank Lines, Cornel G. Allen, and Walter B. Allen, all of Montebello, seek authority under the same section to acquire control of the operating rights through the purchase.

In another application in No. MC-22167 (Sub-No. 21), filed December 21, 1964, Copperstate seeks authority under section 207 of the act to operate, as a motor common carrier over regular routes, in the same area as a portion of the irregular-route operating rights to be acquired, as hereinafter further explained. Although the notice of the filing of this application in the Federal Register stated that it was directly related to the finance proceeding in No. MC-F-8808, this is only partially true, since a portion of the authority sought by Copperstate in its extension proceeding is new authority, and thus cannot be directly related. By order of November 18, 1966, under section 17 of the act, the entire matter in No. MC-22167 (Sub-No. 21) was assigned to division 3 for handling and determination on a con-

solidated record with the proceedings in Nos. MC-F-8978, MC-F-8808, and MC-59680 (Sub-No. 142). However, thereafter we recalled all of the proceedings from division 3. The publication also stated that the application was one to be determined under the special conversion rules as set forth in No. MC-C-4366, but this was later retracted. It is conceded by applicants that the application is one to be decided on the basis of public convenience and necessity.

Hearing has been held at which 14 motor carriers[2] and the Texas Railroad Association, representing the 11 railroads operating in Texas and the motor carrier subsidiaries of 2 of them, appeared, cross-examined applicants' witnesses, and certain of them introduced evidence. In addition, the Portland (Oreg.) Traffic Association intervened in support of the Copperstate applications. The findings of the hearing examiner with respect to the financial condition of applicants and, the history, organization, and operations of applicants and protestants are adopted as our own except to the extent they may be inconsistent with our findings. Applicants in each of the two purchase proceedings are motor common carriers in interstate or foreign commerce, and in each case they operate in excess of 20 motor vehicles in transportation subject to part II of the act.

Temporary Authority

Pursuant to orders entered September 30, 1964, in each of the two purchase proceedings, as amended by order of February 5, 1965 in No. MC-F-8798 and by orders of February 15, 1965 in Nos. MC-F-8798 and MC-F-8808, Strickland and Copperstate were authorized to lease the respective portions of the operating rights of England (La.) which they seek to acquire under those applications. Copperstate was also authorized to lease the motor carrier equipment of England (La.) and certain of the operating rights of England (Tex.). All lease rentals so paid would apply as partial payment of the purchase price in the event of approval. Temporary operations under these authorities were instituted by Strickland on October 5, 1964, and by Copperstate on October 28, 1964.

[2] *Group 1:* Braswell Motor Freight Lines, Inc. (Braswell), Gordon's Transports, Inc. (Gordons), East Texas Motor Freight Lines, Inc. (East Texas), Herrin Transportation Co. (Herrin), Red Ball Motor Freight, Inc. (Red Ball), and Saia Motor Freight Line, Inc. (Saia); *Group 2:* Campbell Sixty-Six Express, Inc. (Campbell), Arkansas-Best Freight System, Inc. (Arkansas-Best), and Delta Motor Line, Inc. (merged into Arkansas-Best on July 6, 1965 and hereinafter considered a part of that carrier); and *Group 3:* Brown Express, Inc. (Brown), Central Freight Lines, Inc. (Central), Western Gillette, Inc. (Western Gillette), Ryder Truck Lines, Inc. (Ryder), and Red Arrow Freight Lines, Inc. (Red Arrow). Carriers in group 1 are protestants to all four of the applications herein; those in group 2 are protestants only to Strickland applications; and those in group 3 are protestants only to the Copperstate applications. For convenience, protestants will hereinafter be referred to by the short names shown in parenthesis.

HISTORY AND OPERATIONS OF THE ENGLAND COMPANIES

England (La.).—This company was incorporated in 1942. In 1954 control passed into the hands of J. C. Hunter. In 1958 Strickland contracted with Hunter to purchase all of the stock of England (La.) for $175,000, which transaction was the subject of an application denied by this Commission in *Strickland Transp. Co., Inc.—Control—England Transp. Co.*, 85 M.C.C. 549, hereinafter called the prior *Strickland-England* case, based chiefly upon the fact that approval would create a new competitive service to the detriment of protestants therein and for which no need had been shown. Shortly thereafter, in July 1961, control of England (La.) passed to C. L. Callaway, a noncarrier individual and its present principal stockholder through a transfer of stock, a transaction which, standing by itself, was not subject to this Commission's jurisdiction. However, at about the same time Callaway also acquired control of England (Tex.), a situation discussed further hereinafter.

Under certificates issued in Nos. MC-57946 (Sub-Nos. 2 and 3) on May 18, 1950, and September 22, 1950, respectively, England (La.) was authorized to perform the following operations in interstate or foreign commerce:

No. MC-57946 (Sub-No. 2):

General commodities, except dangerous explosives, household goods, as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467, commodities in bulk, and those requiring special equipment, over irregular routes, from New Orleans and Plaquemine, La., to Baton Rouge and Thibodaux, La.; from New Orleans and Plaquemine, La., to Ponchatoula, Hammond, Kentwood, Amite and Clinton, La.; between New Orleans, La., and Plaquemine, La.

No. MC-57946 (Sub-No. 3):

General commodities, except household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467, dangerous explosives, commodities in bulk, and commodities requiring special equipment, over irregular routes, between New Orleans, La., and points within 10 miles of the corporate limits of New Orleans, on the one hand, and on the other, points in Louisiana, except from New Orleans to Amite, Baton Rouge, Clinton, Hammond, Kentwood, Ponchatoula, and Thibodaux, La., and between New Orleans and Plaquemine, La.; and composition pipe, and connections and fittings therefor, over irregular routes, from Marrero, La., to points in Mississippi on and south of U. S. Highway 80.

Its authority to transport composition pipe from Marrero, La. to certain points in Mississippi was also sold to another party at the time of the purchase agreements herein. That transaction was approved in No. MC-F-8842, *Deaton Truck Lines, Inc.—Purchase—England Transp. Co., Inc.*, (not printed) decided June 4, 1965. Its authority to operate as an intrastate carrier in Louisiana was similarly sold.

England (Tex.).—Originally known as D. A. Beard Truck Lines, control of this carrier was acquired by Callaway in July 1961, and it was operated under that name until mid-1963 when its name was changed to England Transportation Company of Texas. On April 15, 1963, this Commission instituted an investigation under section 5(7) of the act in No. MC-F-8415, *Clarence L. Callaway—Investigation of Control—D. A. Beard Truck Lines Company and England Transportation Co.* to determine whether common control of the two carriers had been acquired unlawfully. Shortly thereafter, Callaway filed an application in No. MC-F-8563 seeking approval of the common control should it be found to be required. The two cases were heard on a consolidated record. The examiner found that common control had been effected in violation of section 5 of the act, but that the circumstances were mitigating. He recommended approval of the application in No. MC-F-8563 and discontinuance of the investigation in No. MC-F-8415, which recommendation was adopted by decision and order of the Commission on December 23, 1964.

England (Tex.) is authorized to operate in interstate or foreign commerce as a motor common carrier, over irregular routes, as follows:

No. MC-2960 (Sub-No. 1):

General commodities, except those of unusual value, classes A and B explosives, livestock, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, from Houston, Tex., to Lake Charles and Shreveport, La., and those points in Texas on and east of a line beginning at the Red River and extending along U. S. Highway 277 through Wichita Falls to Abilene, Tex., thence along U. S. Highway 83 (formerly portion U. S. Highway 277) at or near Ballinger, Tex., thence along U. S. Highway 67 to San Angelo, Tex., thence along U. S. Highway 87 to San Antonio, Tex., and thence along U. S. Highway 81 to Laredo, Tex.; and cotton, cotton linters, wool, and mohair, from the above-described destination points to Houston, Tex.

Combined operations.—Prior to temporary authority, the combined operations of the two England companies were almost wholly between Houston and New Orleans, with interchange at Lake Charles, La., and moved in substituted trailer-on-flatcar service (TOFC) of the

Southern Pacific Company. The operation was complicated by the fact that while England (La.) holds authority *between* New Orleans and points in Louisiana, and thus could operate in either direction, the rights of England (Tex.) are limited to eastbound movement *from* Houston *to* Lake Charles. Thus, while the trailers were loaded on flatcars at either Houston or New Orleans and proceeded through to the other city with interruption, the movement can be considered to have been constructively interchanged between the England companies at Lake Charles on eastound movements but needed another basis for the westbound movements. This, the carriers allege, was provided by interchange of the shipments at Lake Charles between England (La.) and the Southern Pacific pursuant to the same agreement under which TOFC was provided. It does not appear that Southern Pacific participated in any individual shipment as a participating carrier or that any division of revenue occurred between the England companies and Southern Pacific other than the flat rate charge for TOFC service. Moreover, the agreement between the England companies and Southern Pacific for TOFC and the tariff published pursuant thereto expressly disclaims any responsibility in Southern Pacific other than as a TOFC carrier.

Cessation of operation.—On April 30, 1964, the England companies ceased all operations, citing unsuccessful negotiations on a new labor agreement for work to be performed after May 1 of that year. They state that the union representing its drivers had indicated that national wage levels would be required by the new contract and that the increased expenses resulting from this wage increase would have totaled $185,000, which could not have been absorbed in its operations without substantial operating losses. Accordingly, they placed their operating authority and equipment for sale at public auction, which was conducted on June 17, 1964. The two vendees herein and Deaton Truck Lines, Inc., were the successful bidders for the interstate operating rights and the equipment.

BACKGROUND AND OPERATIONS OF STRICKLAND

Strickland, a Texas corporation, has 10 shares otstanding, of which 9 are owned by L. R. Strickland and 1 by F. B. Strickland. It is a long-line carrier, principally of general commodities, over a network of regular routes, extending between New Orleans, La., and Texas points, on the south, and Boston, Mass., on the north, serving such points as Houston, Dallas, and Texarkana, Tex., Little Rock, Ark., Memphis, Tenn., St. Louis, Mo., Chicago, Ill., Cleveland, Ohio, and New York

N. Y., plus numerous intermediate and off-route points. It has extensive terminal facilities at principal points. Although it is presently authorized to serve New Orleans, it must do so by a circuitous route from Texarkana via Houston and Beaumont, a distance of 644 miles as opposed to the more direct route from Texarkana via Shreveport, La., of 389 miles. It was alleged that Strickland may operate to New Orleans over a deviation route via Kinder, La., stated in the record to be somewhat shorter than via Houston. However, this is misleading because that deviation route applies to Dallas-Kinder-New Orleans movements. Therefore, on shipments to and from points north of Texarkana, if that deviation route were to be lawfully utilized by tacking at Dallas, it would be approximately 750 miles from Texarkana to New Orleans.

Strickland is also authorized to operate between Little Rock, Ark., Greenville, Miss., and Monroe, La., by virtue of newly-regained rights which had been under long-term lease to another carrier, and which had not been regained at the time of the hearing. However, the prospect and the ultimate effect of their being regained was considered in some detail both at the hearing and by the hearing examiner in his report and recommended order. The rights in question were leased to Burks Motor Freight Line in 1948 for 10 years with an option to renew for another 10 years at expiration. This arrangement was approved by the Commission in No. MC-FC-31502 on March 18, 1948. The option was exercised in 1958 for an additional 10 years, and, as extended, approved by the Commission in *Burks M. Freight Line, Inc.—Lease—Strickland Transp. Co.*, 75 M.C.C. 153 (1958). This lease would have nominally expired on March 18, 1968.

On August 30, 1966, the United States District Court for the Eastern District of Arkansas, Western Division, issued its judgment in *Strickland Transp. Co., Inc.* v. *Burks M. Freight Line, Inc.* which terminated the lease and returned the operating rights to Strickland. Although the judgment of the district court has been appealed by Burks, it was not stayed, and accordingly, it has become effective. Strickland has notified the Commission that it has instituted operations under those rights. Since the temporary operations by Strickland of the operating rights of England (La.) would permit operations between either Shreveport or Monroe and New Orleans, and the route by Monroe is considerably shorter from Little Rock to New Orleans than over the Texarkana and Shreveport gateways, presumably Strickland's long-line service between New Orleans and northern points is now being conducted over Monroe,

as Strickland's witness testified at the hearing that it would do. Thus, the Monroe route takes on more importance than existed at the time of the hearing when this shortcut was more remote.

As mentioned, Strickland earlier attempted to secure more direct access to New Orleans by acquisition of the stock of England, but this was denied. In August 1960, Strickland made another effort to offset its circuity to New Orleans by use of TOFC service of the Illinois Central Railroad from and to East St. Louis, Ill. This was discontinued thereafter as a result of a complaint by Gordons, a protestant herein, in *Gordons Transports, Inc.* v. *Strickland Transp. Co.*, 318 I.C.C. 395 (1962), hereinafter referred to as the *Gordons-Strickland complaint* case, where the Commission forbade such an arrangement on grounds that it provided an undue competitive advantage, allowing service different from that provided by Strickland's certificate. The Commission's decision was upheld in *Strickland Transp. Co.* v. *United States*, 219 F. Supp. 618 (1963). This decision was cited as a factor in the reasoning a short time later in Ex Parte 230, *Substituted Service—Piggyback*, hereinafter referred to as the *Piggyback Rules* case, 322 I.C.C. 301, 323, the decision which considered and promulgated the rules for so-called TOFC or "piggyback" service, and which, among others, put forth the rules that a motor carrier must have over-the-road authority to serve any two points served in TOFC service, and that the distance by rail be not less than 85 percent of the authorized over-the-road distance.[3]

The next and most recent attempt to reach New Orleans more directly began in 1961 in an arrangement by which Strickland delivered loaded and sealed trailers to England (La.) at Shreveport for transport to New Orleans and at New Orleans for the return movement. In each case the traffic and trailer was originated by Strickland and turned back to it at destination for which Strickland paid England (La.) a flat fee, irrespective of the weight or contents of the trailer. England (La.) furnished only the motive power for such movements. This arrangement ceased in May 1964 when the England companies discontinued operations, but Strickland began using the Shreveport-New Orleans route again in October 1964 when it began temporary operation of this portion of the authority of England (La.).

[3]The effective date of the rules has been stayed by the Commission on its own motion pending appeal to the courts. In *Atchison, T., & S. F. Ry. Co.*, v. *United States*, 244 F. Supp. 995, two of the rules were found by the district court to be beyond the Commission's authority to impose. However, the "85-percent" rule respecting circuity was expressly upheld. The lower court was affirmed by the Supreme Court on May 29, 1967 (G. C. Memo. 130-67).

THE STRICKLAND APPLICATIONS

No. MC-F-8798.—The two purchase applications herein contemplate a split of the destination-territory contained in the radial and other operating rights of England (La.) in No. MC-57946 (Sub-Nos. 2 and 3) along U. S. Highways 190, 165, and 90 in Louisiana. Strickland would purchase, for $495,000, that portion which authorizes transportation of general commodities, with exceptions, (1) from New Orleans and Plaquemine, to Kentwood, Amite, and Clinton, La., and (2) between New Orleans and points within 10 miles of the corporate limits thereof, on the one hand, and on the other, points in Louisiana north of a line beginning at the Mississippi-Louisiana State line and extending along U. S. Highway 190 to its intersection with U. S. Highway 165 at Kinder, La., thence along U. S. Highway 165 to its intersection with U. S. Highway 90 near Iowa, La., and thence along U. S. Highway 90 to the Texas-Louisiana State line, except from New Orleans to Kentwood, Amite, and Clinton, La.[4] of the purchase price, $49,500 was placed into escrow at execution of this agreement; which at consummation would be released to England (La.), and Strickland would at that time pay an additional amount to bring its total payment at consummation to 29 percent of the total adjusted consideration, i.e., the total consideration less any amounts that may have been paid as lease rental under temporary authority at the rate of $7,425 per month. The balance would be represented by five equal promissory notes, one of which would be payable on or before each of the five succeeding anniversaries of the consummation date and bearing interest at the rate of 6 percent per annum on the unpaid balance. Strickland would pay the purchase price from current funds and no borrowing would be required.

No. MC-59680 (Sub-No. 142).—Strickland seeks authority under this application to operate, over regular routes, in the transportation of:

General commodities, except household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467, dangerous explosives, commodities in bulk, and commodities requiring special equipment, between New Orleans and Shreveport, La., from New Orleans, via U. S. Highway 61 to its

[4]As designated by applicants, the description is slightly deficient in that U. S. Highway 190 does not quite reach the Mississippi-Louisiana State line. The description will be amended to what was obviously intended, i.e., "points in Louisiana north of a line beginning at the Mississippi-Louisiana State line and extending along U. S. Highway 90 to its junction with U. S. Highway 190, thence along U. S. Highway 190," and will be hereinafter considered in this manner. The temporary authorities in these cases were also so amended by us.

intersection with U. S. Highway 190, thence via U. S. Highway 190 to its intersection with U. S. Highway 71, thence via U. S. Highway 71 to Shreveport, and return over the same route, serving all points within 10 miles of New Orleans as off-route points, and restricted against traffic originating at, or destined to points more than 10 miles from New Orleans corporate limits and on U. S. Highway 61 on or south of its intersection with U. S. Highway 190.

This application is conditioned upon approval of the application in No. MC-F-8798 to purchase a portion of the operating rights of England (La.) and is actually an attempt to change an existing irregular-route authority to regular route in frank acknowledgement that this portion of the England (La.) authority has in the past been operated as a regular route. The application does not, however, seek to alter, cancel, or otherwise relinquish any of the remaining irregular routes of England (La.) sought in the purchase transaction.

Background and Operations of Copperstate

Copperstate, together with its wholly owned subsidiaries, Valley Motor Lines, Inc., and Valley Express Co., form a large integrated system which is a portion of an even larger interlocking corporate complex. The history, operations, and corporate affiliations of Copperstate have been described in detail and approved in several recent decisions of the Commission.[5] As a system, Copperstate is authorized to operate, largely in this transportation of general commodities, over regular routes, between Portland, Oreg., and Los Angeles, Calif., between Los Angeles and several Texas points, and between Phoenix, Ariz., and Salt Lake City, Utah, serving virtually all principal intermediate points. It and its affiliates have extensive authority within this general area as to both general and specified commodities and as to specialized service to serve a wide range of intermediate or off-route points, over regular and irregular routes.

As here pertinent, Copperstate itself operates from and to the Pacific coast through Arizona and New Mexico, and enters Texas via the El Paso gateway. From El Paso its routes radiate northward and eastward to Amarillo, Dallas-Fort Worth, and Houston, forming a network in southwest Texas, but providing no direct route between those three terminal points. Between Amarillo and Dallas it must operate circuitously via Sweetwater, and between Dallas and Houston via Brownwood and Austin.

[5] *Consolidated Copperstate Lines—Pur.—Sunset M. Lines*, 85 M.C.C. 113; *Valley Motor Lines, Inc.—Pur.—Pierce Freight Lines, Inc.*, 87 M.C.C. 317, reversed on new evidence on April 16, 1962 (not printed); and *Consolidated Copperstate Lines—Purchase—Nielsen*, 90 M.C.C. 483.

THE COPPERSTATE APPLICATIONS

No. MC-F-8808.—Copperstate would purchase (1) all of the operating rights of England (Tex.); (2) those portions of the operating rights of England (La.) which authorize the transportation of general commodities, over irregular routes, (a) from New Orleans and Plaquemine, to Baton Rouge, Thibodaux, Ponchatula, and Hammond, La., (b) between New Orleans and Plaquemine; and (c) between New Orleans and points within 10 miles of corporate limits thereof, on the one hand, and on the other, points in Louisiana on and south of a line beginning at the Mississippi-Louisiana State line and extending along U. S. Highway 90 to its intersection with U. S. Highway 190, thence along U. S. Highway 190 to its intersection with U. S. Highway 165 at Kinder, La., thence along U. S. Highway 165 to its intersection with U. S. Highway 90 near Iowa, La., and thence along U. S. Highway 90 to the Texas-Louisiana State line, except from New Orleans to Baton Rouge, Thibodaux, Ponchatula, and Hammond, La.; and (3) the motor vehicle equipment of England (La.) as enumerated in the written agreement between the parties, for a total consideration of $400,000. Of the purchase price, $40,000 was placed in escrow at execution of the agreement, to be released to the England companies at consummation. The remainder would be paid $110,000 additional, in cash, at consummation, and the balance of the total adjusted consideration, i.e., the total consideration less any applicable amounts paid as lease rental under temporary authority, would be represented by five promissory notes, one of which would be payable on or before each of the five succeeding anniversaries of the consummation date, and bearing interest at the rate of 6 percent on the unpaid balance.

The purchase price is allocable $225,000 to the motor vehicle equipment and $175,000 to the operating rights. An independent appraisal shows the equipment to be valued at $209,950. All sums paid under temporary authority shall be applied as partial payment of the purchase price. In the case of the operating rights, the monthly rental is $2,500, and for the equipment, a monthly rental not exceeding $5,834.29 that being the amount due monthly on the equipment lien payments as of the date of the agreement, the amounts thereafter decreasing as the interest decreases. When Copperstate has paid a total of $105,000 as lease rental on the equipment, then the monthly rental thereon will drop to $1 until the application under section 5 is determined. The equipment would be sold to and retained by Copperstate at the $105,000 figure if the section 5 application is not approved. As the monthly lease rental for the equipment would pay the $105,000 purchase price

in approximately 18 to 20 months, and over 2 years have elapsed since the advent of temporary authority, it is safe to assume that the equipment price has now been fully paid.

No. MC-22167 (Sub-No. 42).—Copperstate seeks authority under this application to operate as a motor common carrier, over regular routes, in the transportation of:

General commodities, except dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467, commodities in bulk and commodities requiring special equipment; between Houston, Tex., and New Orleans, La., serving all intermediate points, from New Orleans, La., via Interstate Highway 10 and U. S. Highway 61 to Baton Rouge, La., thence via U. S. Highway 190 to Kinder, La., thence via U. S. Highway 165 to its intersection with Interstate Highway 10 and U. S. Highway 90 near Iowa, La., thence via U. S. Highway 90 to Lake Charles, La., and to the Louisiana-Texas State line, thence via U. S. Highway 90 and Interstate Highway 10 to Houston, Tex., and return over the same route. From Houston, Tex., over U. S. Highway 90 (via Beaumont, Tex.) to its intersection with Interstate Highway 10, thence via Interstate Highway 10 and U. S. Highway 90 to Lake Charles, La., thence via Interstate Highway 10 and U. S. Highway 90 to New Orleans, La., and return over the same route.

As previously pointed out, the regular-route authority sought herein is largely encompassed by the irregular-route authority sought to be purchased in No. MC-F-8808, except that England (Tex.) holds no authority westbound from Lake Charles, La., to Houston, Tex., and to this extent the application is one for new authority.

THE EXAMINER'S RECOMMENDATIONS

The examiner found that the operations of the England companies, to the extent that he would recommend granting the applications, were lawful and continuous except insofar as England (La.) had been cross-hauling its radial basepoint of New Orleans, and that this unlawful activity had resulted from a misunderstanding of a reply to an earlier inquiry by England (La.) of the local I.C.C. supervisor regarding permissible use of its authority. To illustrate the unlawful movements, consider a shipment picked up at Shreveport, moved to New Orleans, and then delivered in Lake Charles. See *Gay's Exp., Inc.* v. *Haigis and Nichols*, 43 M.C.C. 277, and cases cited therein. He found that protestants would either be protected by the conditions he would impose or would not be materially affected by approval of the applications. On this basis, he recommended approval of the applications in Nos. MC-F-8798 and MC-F-8808 to the extent that the rights

were shown to have been operated by the England companies. But on the basis of this showing and the accompanying section 207 applications in each case, he recommended conversion of portions of the acquired rights from irregular route to regular route, subject to certain restrictions which he thought appropriate, and cancellation of the remainder because of dormancy.

The Strickland applications.—The examiner recommended approval of the application in No. MC-59680 (Sub-No. 142) by which Strickland would be granted authority to transport general commodities, with exceptions, over a regular route, between Shreveport and New Orleans. He also found that the application to purchase in No. MC-F-8798 should be granted as to that portion of the operating rights of England (La.) between New Orleans and Monroe, serving a number of intermediate and off-route points, and that that authority should be then redescribed as a regular route, citing the Commission's action in *Deaton Truck Lines, Inc.—Purchase—Lavender,* 97 M.C.C. 256 (decided August 7, 1964), hereinafter referred to as the *Deaton-Lavender* case, upheld in *Alabama Highway Express v. United States,* 241 F. Supp. 290, and affirmed, *per curium,* by the Supreme Court at 382 U. S. 106. In each case he would restrict the authority to be acquired or granted against combining with any other operating rights held by Strickland to provide a single-line service between New Orleans and the Memphis, Tenn., commercial zone, and he would similarly restrict the Monroe-New Orleans route against combining to provide a service between points on that route and those in the Shreveport commercial zone.

The Copperstate applications.—The examiner recommended approval of the application in No. MC-F-8808 subject to certain conditions and restrictions. He would authorize acquisition of the general commodity, irregular-route rights of England (La.) in No. MC-57946 (Sub-Nos. 2 and 3) from New Orleans and Plaquemine to Thibodaux, Ponchatoula, and Hammond, between New Orleans and Plaquemine, and between New Orleans and points within 10 miles thereof, on the one hand, and on the other, the described area of Louisiana south of U. S. Highways 90, 190, 165, and 90. He would also grant the application as to Houston-New Orleans service, and pursuant to a grant of the accompanying section 207 application in No. MC-22167 (Sub-No. 21), would define the emerging irregular-route authority of England (La.) and England (Tex.) to provide for a regular route between Houston and New Orleans, serving the intermediate points of Baton Rouge and Lake Charles, the off-route point of New Iberia, La., and points within 10

miles of New Orleans, unrestricted, and Beaumont, Tex. on eastbound traffic only. This route would be only over Interstate Highway 10 rather than the several routes requested by applicants. The entire authority which he would grant would be subject to restrictions (1) that the regular- and irregular-route rights could not be combined to provide a through service between points on the regular routes and points on the irregular routes other than Plaquemine, Thibodaux, Ponchatoula, and Hammond, and (2) that the authorities be restricted against traffic moving from, to, or through points in Louisiana north of U. S. Highways 90, 190, 165, and 90.

EXCEPTIONS OF PROTESTANTS

Exceptions were filed by Arkansas-Best and jointly by Gordons and Campbell Sixty-Six to the report of the examiner as it pertains to the Strickland applications. Similarly, Ryder, Central, and Saia filed exceptions to the report only as it applies to the Copperstate applications. Exceptions as to all applications were filed by Red Ball, Herrin, and Braswell. As the points raised on exceptions are substantially similar, they will be stated collectively as to each vendee-applicant unless specific reference to a certain protestant is deemed necessary.

The Strickland applications.—Protestants urge that the operations of England (La.) were dormant, both constructively and in fact. They point out that the England companies simply abandoned their operations in May 1964 on the basis of being unwilling, not unable, to conduct operations because of the mere possibility, not certainty, of a future labor dispute and its effect, and that no operations were conducted under their operating rights until October 1964 when temporary authority was granted. They further charge that the unlawful aspect of certain of the operations render them inadmissible as evidence of an active and continuous service. They state that the purchase price is unreasonable, particularly in view of the prior *Strickland-England* case in which a much smaller amount was found excessive, and that a strong suspicion exists that vendor's stockholder is trafficking in operating rights.

Protestants strongly urge that the Shreveport-New Orleans operation of Strickland and England (La.) was unlawful since they conducted regular-route operations over irregular-route authority, both before and during temporary authority, in violation of the principals enunciated in *Transportation Activities, Brady Transfer & Storage Co.*, 47 M.C.C. 23, hereinafter called the *Brady* case. Also, they call unlawful the so-called "interchange" at Shreveport and New Orleans which they characterize variously as (1) control of the operations of England

(La.) by Strickland, or (2) a pooling of traffic and services in violation of section 5(1) of the act. They also charge that the examiner wrongfully held this proceeding as not a proper place to adjudicate these questions of unlawfulness and in styling the Strickland-England arrangement as merely "novel," pointing out that it was essentially the same arrangement that was stopped in the *Gordons-Strickland complaint* case, and that he accordingly erred in finding that the arrangement did not impinge on the fitness of Strickland nor cast the "curse of dormancy" upon England's authority between Shreveport and New Orleans because those operations "were not challenged by the Commission or other carriers for 2½ years" and thus may not now be considered.

Additional assignments of error which protestants attribute to the examiner's report are that he erred in finding that the illegal cross-hauls of a radial base point by England (La.), which he did find to have occurred, were the result only of a misinterpretation of a supervisor's letter by the president of that company; that he erred in stating that other carriers, including protestants, engage in similar practices as Strickland and England (La.) in the Shreveport-New Orleans arrangement, there being no facts of record to support such an assertion and the arrangement having no parallel to a true interline arrangement or commercial-zone delivery; that he erred in stating that Herrin is unlikely to be affected by approval; and that he erred in failing to include Chicago and St. Louis along with Memphis in the protective restrictions to be imposed, or in finding that the extra costs involved in circuity would relieve competition.

They state that Strickland would put the operating rights to be acquired herein to a totally new and different service than that for which they were originally granted, and that the division sought would result in a confusing, illogical, and impractical carving-up of the rights of England (La.), which would permit the same service to be provided by as many as three different carriers, operating through overlapping commercial zones, where only one previously operated, and this in spite of the cumbersome and confusing restrictions which would be imposed by the examiner. They call amazing the granting of the Monroe-New Orleans route, an authority not even requested by applicants, and in an unfair result since it was not published as such and thus could not be anticipated or specifically opposed by protestants. The examiner's reliance upon the *Deaton-Lavender* case was improper, they charge, since that case actually restricted the operating rights granted while the recommended result herein would upgrade the irregular routes to regular route. And finally as to the

section 5 application, they assert that no public need was shown for reinstitution of the dormant rights.

Specific exceptions to the section 207 application are that there was no evidence warranting conversion of the transferred irregular-route rights to regular route, there being a total failure to show public convenience and necessity but rather witnesses who expressed merely a desire as opposed to a need for Strickland's service; that the examiner erred in granting authority to serve intermediate points on the routes granted since applicants did not seek it in their application nor was such request contained in the publication thereof; that there is no evidence to support the selection of the particular points granted; and that the examiner failed to make certain statutory findings respecting sections 207 and 214, which makes his report fatally defective. They assert that examiner also failed wholly to deal with certain issues and contentions raised by protestants on brief or to rule concerning certain requested findings of fact or conclusions of law.

The Copperstate applications.—Exceptions to the examiner's recommendation in the Copperstate applications are similar insofar as charges of actual and constructive dormancy, abandonment, and the reasonableness of the purchase price. Specifically, they charge that the operation by the England companies wholly in TOFC service between Houston and New Orleans constituted abandonment of highway operations, and the operating rights to that extent are therefore dormant. Also, they charge unlawfulness in the use of the irregular routes as regular routes, citing the *Brady* case, between Houston and New Orleans. Primary among their exceptions is that England (Tex.) conducted unlawful operations from Lake Charles to Houston, utilizing railroad service without authority, and that the examiner erred in characterizing this as lawful interchange or "pure railroad freight." They point out further that Copperstate has continued during temporary authority the unlawful operations formerly conducted by England (Tex.) by the same or other devices. They charge that the examiner erred in finding that these unlawful practices were not before the Commission in this proceeding.

Protestants also claim that the examiner erred in finding that the England companies moved traffic from New Orleans to Texas points in competition with Red Ball; that he erred in not finding that there was no public need shown for reinstitution of England's dormant service; that he erred in finding that Braswell could stand the additional competition which would be afforded by Copperstate; and that he erred in minimizing the effect of the loss of revenue to Ryder from traffic formerly interchanged with Copperstate at Houston.

With respect particularly to the section 207 application, protestants assert that applicants failed to sustain their burden of proof in showing

public convenience and necessity for the requested authority, but only showed a desire for the services of Copperstate coupled with the unfamiliarity as to other available services or comparatively minuscule complaints concerning them. They charge that the examiner erred in finding the services of Herrin and Ryder insufficient between Houston and Louisiana points or that Central and Red Ball would not be affected by the new regular-route service of Copperstate. They also charge that he erred in finding a need for westbound service by Copperstate from Lake Charles to Houston, particularly in finding that the proof of need for eastbound service reduces the quantum of required evidence of need for westbound service also. They charge that the examiner did not make the statutory findings that Copperstate is fit, willing, and able, which makes his report fatally defective, and that there is evidence in the record to the contrary, even if they had been made. Protestants state that there is no resemblance between the authority that the examiner recommends and that which presently exists in vendors, but that the examiner's recommendation seeks mainly to accommodate Copperstate.

REPLIES OF APPLICANTS

Reply of Strickland and England (La.).—The joint reply in the Strickland applications states that protestants fail to submit any specific evidence of traffic which they would lose by approval; that the revenues and earnings for each protestant to the Strickland applications show significant gains for each during the period Strickland was operating a portion of the authority of England (La.) under temporary authority; that applicants filed promptly upon cessation of operations by England (La.) on April 30, 1964 and were not lax in seeking to obtain it but that approval could not be obtained from the Commission until October 5 of that year, following which Strickland promptly instituted operations; that the prior *Strickland-England* case, negotiated in 1958, affords no basis for passing on the purchase price in this proceeding, arrived at in 1964 at public auction at which several of the protestants participated and helped to bid up the price to the level finally reached; that the earlier case was actually denied on grounds other than purchase price; that the proposed division of the authority of England (La.) is not confusing, illogical, and impractical— nor is it novel, but similar divisions have been approved by the Commission in several previous instances; and that the procedures employed in the Strickland-England interchange at Shreveport and New Orleans were carried on with the full knowledge of protestants and Commission employees.

They request that the examiner's report be upheld but that one condition he would impose be removed: that which would require the Strickland and Copperstate transactions to be consummated simultaneously and that one not be consummated without the other. They state that the operating rights of England (La.) are readily divisible and could reasonably be consummated independently of each other.

Reply of Copperstate.—In its reply Copperstate also points out that the temporary dormancy in the operations of the England companies was not excessive or unusual, similar cases having been approved many times in the past; that the operations of England (La.) in the areas south of U. S. Highways 90, 165, 190 and 90 had been sufficiently frequent and widespread to meet the Commission's test of substantiality; that there were no knowing or willful unlawful operations by England; that Ryder made no specific showing of traffic that would be diverted to Copperstate following approval nor is any likely; that numerous shippers testified as to a need for new and additional service, citing complaints against existing service, including that of protestants; that Copperstate met its burden of showing a need for westbound service but simply showed less testimony than as to eastbound service; and that protestants present a confused argument as to whether the Houston-New Orleans service is regular route or irregular route, the matter being at best a borderline situation which Copperstate seeks to alleviate by seeking regular-route authority, one of the alternatives presented in the *Brady* case.

Discussion and Conclusions

The Strickland applications.—First, we wish to reject the charge of actual dormancy in the England operations, notwithstanding the fact that circumstances surrounding of the precipitous cessation of operations in May 1964 raise the inference that the England companies were merely unwilling, rather than unable, to continue. The reason for a cessation of operations is not significant under section 5. We gave due consideration to this aspect of the case in the earlier actions for temporary authority, wherein the applications were at first denied, then granted upon petitions for reconsideration, which accounts for the fact that several months elapsed between the filing of the application and the reinstitution of operations. Such brief lapses of service are not unusual and have been present in applications approved in the past where temporary authority was granted, without constituting dormancy of the operating rights. However, we wish to emphasize that an application

for temporary authority is decided without a hearing and without unnecessary delay. Approval of temporary authority is merely an acknowledgement on our part, in our discretion, that there is evident danger of injury to operating rights that are worth preserving. As the temporary authority order states, the grant raises no presumption as to action that may be taken subsequently under section 5 when we have had the benefit of more leisurely and detailed scrutiny of the proposed transaction.

This brings us to the matter of constructive dormancy, which for purposes of this inquiry may be defined as the conduct of operations that may not be considered because they were unlawful or not conducted in accordance with the Commission's rules and regulations. In this matter we do not agree that the arrangement of Strickland and England (La.) between Shreveport and New Orleans may not now be questioned because not challenged for 2½ years. The question of fitness is always before us in section 5 proceedings. *United States Van Lines, Inc.—Purchase—Bell,* 90 M.C.C. 362. Protestants urge that the arrangement was either an unlawful pooling of traffic and services or an unlawful control by Strickland of the operations of England (La.). We do not agree that the arrangement was either of these things. Our findings as to what the arrangement constituted requires first that more detailed analysis of the actual operation be conducted.

The evidence shows that Strickland transferred loaded and sealed trailers to England (La.) at Shreveport for transport to New Orleans and at the latter point for transport in the opposite direction. In practice, Strickland notified England (La.) of how many trailers it would have on any given day at each end of the line segment, and England (La.) sent tractors to Strickland's terminals at New Orleans or Shreveport to pick them up. At the opposite end the trailer was delivered intact and still sealed to Strickland's terminal. In New Orleans Strickland broke bulk for distribution to other points, some of which was interchanged to other carriers (including England (La.) for delivery to certain points in Louisiana). At Shreveport the record is less explicit, but judging from the abstract of shipments submitted, presumably the trailer was then simply shifted to a Strickland tractor for movement to distant cities in the upper midwest and east. England (La.) cut no bills on the individual shipments nor was it shown as a connecting carrier on Strickland's bills, except that some of the bills issued by Strickland on shipments transported in this manner bore a rubber stamp to show the routing. It did not pick up, deliver, nor participate in billing or claims as to the shipments. In fact, vendor's president testified that, in order to prepare his abstract of shipments as to traffic transported

under this arrangement, it was necessary for him to secure the freight bills from Strickland at its New Orleans terminal, and they are listed in the abstract in groups under an England manifest which lists them by Strickland PRO numbers. England (La.) did not share in a pro-rata division on each shipment but received a flat sum for hauling a trailer, full or empty, between New Orleans and Shreveport. Most of these trailers used were Strickland's, a few were England's, but in neither case does there appear to have been any lease arrangement as to particular trailers, it being testified that England's trailers were "quickly absorbed into the trailer interchange."

This does not constitute interchange within the meaning of our rulings, nor is it any form of interlining as we define it. Interlining is the practice whereby a carrier transfers a *shipment* to another carrier at a point of joint service for delivery or for further movement and later interline with another carrier. Interchange is a kind of interline which involves the exchange of equipment, here trailers but often tractors and trailers with or without drivers. Compare *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 121. Usually interchange involves loaded vehicles, but in any form it is governed by the *Lease and Interchange of Vehicles Rules*, 49 CFR 307.[6] England and Strickland have not offered lease agreements covering such of Strickland's trailers as were used, and the flat charge for their movement was the same no matter whose equipment was used. If for no reason than failure to comply with section 307.5(c) of those rules, the arrangement between applicants here was not a lawful interchange. That section requires an arrangement under which:

> * * *the rates charged and the revenues collected must be accounted for in the same manner as if there had been no interchange of equipment. Charges for the use of the equipment shall be kept separate and distinct from divisions of the joint rates or the proportions thereof accruing to the carriers by the application of local or proportional rates.

England (La.) had no liability to the actual shippers nor is there anything to suggest that England (La.) exercised control or responsibility over the traffic or that it functioned as an independent interchange carrier, as required by law. Because there was no lawful interchange, there was no lawful use of the rights of England (La.). Because the operations were really under the management and control of Strickland, insofar as the relationship with and liability to shippers was concerned, they constitute operations by Strickland without possession of a certificate.

[6]Previously designated 49 CFR 207; renumbered April 1, 1967, when all section designations in 49 CFR were increased by 100 numbers.

We conclude that the Shreveport-New Orleans movements of loaded trailers handling traffic of Strickland purportedly under the rights of England (La.) were unlawful. In addition, to the extent such traffic had a prior or subsequent movement by England (La.) between New Orleans and other Louisiana origins or destinations under the same irregular-route rights, unlawful cross-hauling was also involved. Such unlawfulness reflects adversely on the fitness of both applicants. Even if we did not so find, we note that applicants in a section-5 proceeding have the burden of proving that the vendor performed substantial and lawful movements under the rights involved in the transaction. *Dealers Transit, Inc.—Control and Merger,* 93 M.C.C. 611, 619. Applicants have not borne this burden. Whether this be pooling, interchange, or constructive control or lease by Strickland of the England (La.) rights, it was not authorized, not in compliance with our rules and regulations, and not lawful. Any way we slice the apple of the arrangement between applicants, it comes out wormy.

Applicants admit that the arrangement described was novel. Such admission coupled with their failure to ascertain, even if they did not prove, the lawfulness thereof, adds an element of willfullness. Such a conclusion is particularly significant since a previous effort by Strickland to find a short way to move traffic from the midwest to New Orleans had been found unlawful in the *Gordons-Strickland* complaint case. There speculative use of another "novel" arrangement after that experience borders on foolhardiness.

While we have sometimes approved applications under section 5 despite unlawful prior operations of vendor, such a finding is generally where vendor but not vendee committed the violations, where the operations were conducted under color of right in the honest belief that they were lawful, where an overriding public need for lawful future operations was shown, or where all such elements were present. Here none of these exceptional conditions seems to exist.

We cannot agree with applicants and the examiner that any reasonable interpretation of the previously mentioned letters from the local supervisor for this Commission authorizes the cross-radial movements through New Orleans. The unlawfulness of such practices has been discussed, defined, and prohibited in cases too numerous to mention since 1941 or earlier. Nor does the fact that shipments were turned back to Strickland before being interlined again to England (La.) relieve the unlawfulness. *Colonial Refrigerated Transp., Inc., Ext.—Several States,* 79 M.C.C. 57, 63. No color of right can be considered plausible here either.

The shipper testimony here is mostly from shippers far distant from the routes involved, shippers who have many alternative methods of handling their traffic. Even those whose traffic is more local to the area seem to have no real complaints of inadequate service from existing carriers. Without support of lawful prior operations involving similar traffic, the testimony of shippers supporting the Strickland applications does not show any public convenience and necessity such as to mitigate or excuse the unlawfulness of both the applicants in their joint operations.

There remains the question of whether there are any other operations of England (La.) that can be found sufficient to support a finding of an active and continuous service such as would warrant approval of the application. Insofar as the portion of England's operations involved in the Strickland application are concerned, the only other active service shown was between New Orleans and Monroe, via Alexandria, where vendor testified it operated one truck daily. We are not overly concerned with the fact that England (La.) might have operated irregular-route authority as regular route, since under recent rules this would simply mean that England (La.) should have initiated steps to convert the authority on the basis of the changed usage. But we do note that the service performed appears from the evidence to have been strictly a distribution service from New Orleans of shipments received in interline from long-line carriers, including Strickland. This becomes very important when the use to which Strickland would put this authority following approval is considered and also raises the specter of cross-hauling again.

It is clear that the examiner sought to resolve the difficult set of circumstances in this application by recommending the transfer only of those rights of England (La.) that had been shown to have been operated, while taking recognition of the different use to which the rights would be put. Thus, he would approve and convert in one action while taking notice of the result which would occur when the Strickland rights under lease to Burks were regained and the route via Monroe would thus become vastly more important than via Shreveport, a situation which has now arrived. He would blunt this new service prospect somewhat by restricting the Monroe route against New Orleans-Memphis traffic.

Ingenious as this solution appears, it cannot meet with our approval. Conversion of a portion of England's irregular route rights to a regular route without any request by applicants or publication to the public is a result that could not be anticipated by protestants nor does it give them opportunity to show the adverse effect of such an approval. Moreover, the effects of such a move, providing the final link over the

Monroe gateway in a regular route extending from Boston to New Orleans would create a service which is so vastly different from the simple peddle service provided by England out of New Orleans that an entirely new and different service would be created, which could not but have an adverse effect on the existing competitive situation. Nor does restricting the authority granted against Memphis-New Orleans traffic, as the examiner recommends, furnish a solution to the effect on traffic to other points. As we found in the *prior Strickland-England* case, the acquisition of England's irregular route rights by Strickland and conversion to a link in its long-line regular routes would be of little public benefit and would be certain to harm the operations of existing carriers. The application in No. MC-F-8798 under section 5 will be denied for all the foregoing reasons.

As the application under section 207 in No. MC-59680 (Sub-No. 142) was made directly related to and contingent upon approval of the section 5 application, it must also be denied.

The Copperstate applications.—The previous discussion applies equally to the Copperstate applications insofar as contentions of dormancy based upon cessation of operations are concerned. Copperstate, like Strickland, began operations promptly following the grant of temporary authority in October 1964, a not unduly long period of time after England's cessation of operations. More subtle is the charge that England's operating rights over-the-highway were abandoned by the exclusive use of substituted rail service between Houston and New Orleans. Protestants cite the finding of the court in the review of the *Piggyback Rules* case as authority for this contention.

While it is true that the court in reviewing the *Piggyback Rules* case did express its view that a certificate to operate over the highways as a motor carrier did not authorize, nor was it utilized by the use of, substituted TOFC service, we are not inclined to accept that interpretation in this context. Not only is the court's decision in the *Piggyback Rules* case currently pending on appeal to the Supreme Court, and thus not finally decided, but the right to utilize TOFC service for all or a portion of its lines-haul operations was expressly provided in Rule 4(e),[7] a rule which was not under attack in that review of the case,[8] and thus the issue cannot be considered to have been finally determined. Moreover, the issue of whether motor carriers can lawfully utilize TOFC service for all or a portion of its line-haul movement is currently on review in the courts on a separate appeal from the *Piggyback Rules*

[7]Rule 4(e), 49 CFR 500.4(e) states: "Where joint intermodal TOFC service is to be performed in lieu of a motor or water carrier's authorized all-highway or all-water route, tariffs embracing rates or charges covering such service may provide for the performance of TOFC service for the entire line-haul movement."

[8]In the court's introduction to its opinion, it stated that plaintiffs in the action sought only to nullify rules 2, 3, 5 and 7.

case, brought in the United States District Court for the Northern District of Texas.[9] The latter review has been heard but no decision has been rendered as of this date. Unless and until we are faced with a final rejection of Rule 4(e), we prefer to stand by the rule and the reasoning in the *Piggyback Rules* case under which it was promulgated. Accordingly, the operations of the England companies in substituted service between Houston and New Orleans, to the extent that they were lawful, support the contention that the England companies' use of their rights was active and continuous, and such service does not constitute abandonment of its over-the-road rights such as would support a finding of dormancy.

This brings us to the issue of lawfulness in the combined operations of the England companies, particularly as regards the alleged interchange at Lake Charles. We have indicated in our statement of the facts that eastbound movements can be regarded to have been constructively interchanged between England (La.) and England (Tex.) at that point despite the fact that the flatcar moved through Lake Charles directly to New Orleans without physical handling or interruption of any sort. This is influenced by the fact that the two companies are under common control and management, operating in a coordinated service such as they could perform, if they wished, on nearby highways. Moreover, the indicia of interline is present in that England (Tex.) delivers the trailer to Southern Pacific in Houston, and England (La.) picks it up in New Orleans, each usually cutting its own bills for its share of the operation and participating in a division of the revenue from each shipment as in interline situations.

But the reverse operation strains our credulity. Here England (La.) quite legitimately consigned its trailer to Southern Pacific at New Orleans for transport to Lake Charles on flatcar, but we cannot conceive that the freight was interlined to Southern Pacific at that point or became "pure railroad freight" to Houston on the facts shown. It is admitted by applicants that Southern Pacific did not physically handle the freight or trailer in any way, cut bills, share in the revenues (except for its contracted TOFC charge), deliver, or in any way participate in any shipment, its function ending when it removed the trailer from its flatcar at Houston and placed it in its yard, still sealed, for pickup by England (Tex.).

Moreover, even if we were to accept this concept of interline with Southern Pacific, the role of England (Tex.) at Houston becomes incompatible, since England (Tex.) took charge of the trailer completely, broke bulk, delivered, and interlined with other carriers for points beyond Houston; all in its own name. Since England (Tex.) held no

[9] Civil Action No. 4-355, Lone Star Package Car Co., et al. v. United States.

operating rights from Lake Charles to Houston, and since the movement between those points took place ostensibly under Southern Pacific's authority, its position could be at best that of a terminal carrier operating pursuant to section 202(c)(2) of the act[10] under the direction and responsibility of Southern Pacific. Neither the TOFC contract nor the methods by which the principals operated give support to any such theory. The conclusion is inescapable that England (Tex.) was engaged in operations from the Texas-Louisiana State line to Houston for which it held no operating authority. These operations were thus unlawful and may not be considered.

This is not the forum to decided whether Southern Pacific participated, knowingly or unknowingly, in a violation. Since the railroad did not appear at the hearing to explain its version of the purported interchange, we must accept at face value its statement in the TOFC contract that it was performing only a contractual TOFC substituted service for England (Tex.) between Lake Charles and Houston. In so doing it evidently provided a substituted TOFC service for a motor carrier which had no authority to perform such service. Although railroads are under no obligation to police the operations of motor carriers with respect to their certificates, when they enter into substituted rail-for-motor arrangements with such carriers, they should satisfy themselves that the motor carriers have authority to transport the commodities concerned between the points where the service is to be performed. *Movement of Highway Trailers by Rail,* 293 I.C.C. 93. This principle was reiterated in the *Piggyback Rules* case, at page 365. The record is cloudy as to whether Southern Pacific is presently performing such service for Copperstate under temporary authority, and if so under what arrangement. It was stated that Copperstate continued to operate in TOFC service from Lake Charles to Houston for a brief period following the initiation of temporary operation of the rights of England (Tex.), and there is inference that it continues to do so on occasion. If so, this practice should be immediately halted, unless such operations are all-rail movements from Lake Charles to Houston, and so billed to shippers and consignees.

[10]49 U.S.C. 302(c)(2). Section 202(c)(2) reads as follows:

"(c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

"(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

As to the service which the England companies performed, either lawfully or unlawfully, between Houston and New Orleans, the evidence is that it consisted largely of water-borne truckload traffic received from Sea Land service as opposed to general interline operations with other motor carriers. They did not operate directly to other Texas points nor was the traffic which England (Tex.) interlined at Houston with other carriers a significant factor—certainly not when compared with the new and totally different service or the magnitude of use which would occur with the operating rights in the hands of Copperstate, a carrier with rights extending to the Pacific Coast.

The evidence also shows that England (La.) has likewise operated an unlawful cross-radial haul of New Orleans on traffic bound from Baton Rouge to Houston. While it has authority to operate *from* New Orleans *to* Baton Rouge, it has no direct authority for a return movement except by utilization of the New Orleans based radial right. The only rationale, therefore, on which the movements could have been performed was the aforementioned letter from the supervisor which England (La.) interpreted as authority to conduct a cross-haul operation. However, it appears that Copperstate, following the institution of temporary authority, continued such unlawful movements and informed the examiner at the hearing that it would continue to solicit traffic at Baton Rouge for movement west of New Orleans "until told by the Commission to stop." We believe that a carrier of the size and experience of Copperstate should not have to be told to stop an unlawful operation, particularly when the unlawfulness has been brought to its attention. The conduct of an operation for which no authority exists, and in addition, the brash statement of its intention to continue the unlawful movement constitutes a willful and defiant disregard for regulation which brings the fitness of Copperstate into question. If any question presently exists, England (La.) and Copperstate are directed to discontinue the unlawful movement from Baton Rouge to points beyond New Orleans unless and until appropriate operating authority therefor has been obtained and a certificate issued.

On the basis of the use to which the operating rights sought by Copperstate were put by the England companies prior to this transaction, coupled with the substantial unauthorized carriage both before and during temporary authroity, and the greatly differing use to which those rights would be put following approval, we feel that the transaction in No. MC-F-8808 would not be in the public interest and will be denied.

No. MC-22167 (Sub-No. 21).—Having found that the purchase by Copperstate should be denied, the remaining issue is whether the ap-

plication in No. MC-22167 (Sub-No. 21) may nevertheless be approved. We may properly consider such an application when related to or accompanying (but not wholly dependent upon) a section-5 application notwithstanding that the section-5 application has been denied. *Rocket Transport, Inc.—Purchase—Bush Transfer, Inc.*, 87 M.C.C. 285. In so doing, however, the issue must be determined solely upon the question of public convenience and necessity, as provided in section 207 of the act, without respect to the accompanying section-5 application.

Copperstate introduced a total of 90 shipper witnesses, two traffic associations, and three other motor carriers, all of which gave testimony in support of the application. The traffic associations, representing the interests of New Orleans and Portland, Oreg., shippers, gave general support to the Copperstate applications on behalf of their members. The three motor carriers all serve points in the southeastern United States, terminating at New Orleans on the west, and support the application for the purpose of interline connection from that point to Texas points and the west coast. The 90 shippers are of a wide range of commodities, and are located in Louisiana, including New Orleans and Baton Rouge, Texas, Arizona, California, and Oregon. The hearing examiner, in appendixes H, I, and J to his report, has ably summarized the testimony of the various shipper witnesses as to their reasons for needing Copperstate's service, and those appendixes are hereby incorporated herein by reference. In them, the testimony is separated on the basis of the direction of movement, origin, and destination sought, as follows—

Appendix H—Analysis of shipper and receiver evidence supporting Copperstate application No. MC-22167 (Sub-No. 21), for westbound service from such points in Louisiana as Baton Rouge, New Orleans and other points on the requested regular routes in Louisiana to Houston and beyond.

Appendix I—Analysis of shipper and receiver evidence supporting Copperstate application in No. MC-22167 (Sub-No. 21) for eastbound service from Houston and points west thereof directly to Baton Rouge and other points in southern Louisiana located on the requested routes even though they also ship to Lake Charles, New Orleans, and points within 10 miles of New Orleans.

Appendix J—Analysis of shipper and receiver evidence supporting eastbound service to Beaumont, Tex., Lake Charles, New Orleans, La., and points within 10 miles of New Orleans from—

(1) Houston, itself,
(2) points in Texas located on the regular routes of Copperstate, and
(3) points located on the regular routes of Copperstate west of El Paso

The total number of summaries is larger than the total number of shippers, since certain of them expressed a need for service in more than one category. Our evaluation of this testimony is on the same bases.

The testimony of 15 shippers and receivers of freight are included in appendix H, some of them shippers from the New Orleans and southern Louisiana area, and the others, receivers of freight at west Texas points. Nearly all stated a preference for the service of Copperstate based upon its promise of a faster and more direct service—for example, a second morning service from New Orleans to west Texas. On cross-examination, one shipper was unable to show, however, that the service he had received from Copperstate was significantly different from the service he had received from other carriers. Five of them expressed minor dissatisfactions with existing carriers such as occasional late pickups, difficulty in securing proper equipment, or trouble in tracing shipments. Six expressed satisfaction with existing carriers, and several admitted that they were unfamiliar with or had not used the service of available carriers. The best support in this category is one shipper which uses private carriage to the west coast and will not (under its company policy) use any common carriage which involves a two-line interchange service. However, this carrier uses Herrin to Dallas and is quite satisfied with that carrier. Two of the shippers had been served unlawfully from Baton Rouge to Texas points under temporary authority by Copperstate.

Appendix I, comprises the testimony of 56 shippers, of which 4 are receivers of freight at New Orleans and Baton Rouge from Houston, and the remainder are shippers, 23 from Houston, 7 from other Texas points, 27 from California, 2 from Arizona, and 2 from Oregon. Most stated a preference for Copperstate. Nineteen expressed minor dissatisfactions with existing carriers, such as difficulties in tracing and too late (or too early) pickups. Most also used existing carriers, Braswell, Herrin, or Ryder for the most part, and many of them were satisfied with their service—or at least expressed no dissatisfaction with it. Eleven stated that they had already diverted their traffic to Copperstate under temporary authority or intended to divert based upon Copperstate's promise of a faster or single line service. Some of them were unfamiliar with the service of existing carriers. Many expressed the usual desire of shippers for extra carriers or for a single line service, in this case to New Orleans from California or Oregon. Seven stated a desire for service beyond Louisiana to southeastern points which would necessitate interchange by Copperstate at that point with other carriers.

Appendix J is divided into 3 groups of shippers. The first, comprising 7 shippers, seeks Copperstate's service only from Houston to Beaumont, Lake Charles, or New Orleans. One seeks only an extra carrier in addition on to those already available, two of them use and are satisfied with Herrin, three have minor complaints against existing service, two complained that certain carriers are not interested in their traf-

fic, several have diverted their traffic to Copperstate from existing carriers under temporary authority, one seeks service beyond New Orleans, and two expressed no dissatisfaction with existing service. The second group, 12 shippers, seeks service from other Texas points to New Orleans and most state a preference for Copperstate. Two seek principally a single-line service to New Orleans and three express a desire for service beyond New Orleans. Five have minor complaints with existing service, two have already diverted to Copperstate, and three use other carriers with whom they are generally satisfied. One showed no continuing need for any service.

The third group in appendix J, comprising 51 shippers, is located west of El Paso. Most are in California and the rest in Arizona or Oregon. Most of them have in the past been Copperstate shippers in joint line service at Houston and have no complaints with that service, although they would prefer to have Copperstate furnish a single-line service. Most also use other single- and joint-line carriers for the same service with only a few complaints. Twenty want service either partially or predominantly beyond New Orleans. Nineteen had already diverted to Copperstate's single-line service to New Orleans in place of its joint-line service or that of other carriers.

We have given great consideration to the fact that a large number of shippers have testified in favor of Copperstate's extended service to New Orleans. Nevertheless, we conclude that the public convenience and necessity has not been shown for the institution of such service by Copperstate nor have these shippers shown a need for any service that cannot be supplied by existing carriers. Reduced to its essentials, the numerous shippers have simply expressed a preference for Copperstate, seek additional carriers in addition to those already available, or seek a single-line service over a longer distance. Preference is not a substitute for need where an area is served adequately by established carriers. The mere showing by an applicant of its own fitness and of the shipper's desire to use its proposed service are not sufficient of themselves to warrant a grant of the authority sought. *Carolina Haulers, Inc., Contract Carrier Application*, 76 M.C.C. 254. There is presently an abundance of service between Houston and New Orleans, two of the nation's major population centers, both by protestants and other carriers alluded to in the record. Testimony of record also shows that much of the traffic that Copperstate would generate (or has already generated) would be at the expense of existing carriers. Ryder, in particular, showed that a substantial amount of traffic which it formerly received in interline at Houston from Copperstate has been diverted to the latter's single line service under temporary authority. We recognize a shipper's natural inclination to prefer to have available as many motor carriers as possible to serve it. But it is incumbent upon us

before authorizing a new service to be reasonably certain that a public need exists for such operation which cannot be met adequately by existing transportation facilities. *Dallas & Mavis Forwarding Co., Inc., Ext.—Toledo to Nebr.*, 76 M.C.C. 273.

Nor is the desire for a single-line service, particularly from points located more than half a continent away from the destination in question, of compelling significance. The Commission has usually held that shippers are not entitled to single line service where satisfactory and adequate joint line service is available. *Watkins Motor Lines, Inc., Ext.—Canned Goods—Iowa*, 74 M.C.C. 795. Interline service between two, or even among three carriers, cannot be said to be per se inadequate, particularly where, as here, transportation is sought to very distant points. *Curtis, Inc.* v. *United States*, 225 F. Supp. 894. Moreover, many of these shippers who desire a single-line service from west coast points to New Orleans actually seek service largely beyond New Orleans to points in the southeastern States, which means that interline would be required at New Orleans in any event. In these circumstances it seems hardly of consequence to these shippers whether interline, on what is practically a transcontinental movement, occurs at Houston or New Orleans. The lack of need shown for an extension of Copperstate's authority, coupled with the questionable aspect of its fitness in conducting temporary operations impel us to deny the application for new authority under section 207.

We find, in No. MC-F-8798, that the transaction proposed has not been shown to be consistent with the public interest and that the application accordingly should be denied.

We further find, in No. MC-59680 (Sub-No. 142), that the public convenience and necessity has not been shown to require operation by Strickland Transportation Co., Inc., as a motor common carrier of general commodities, with exceptions, over a regular route, between Shreveport and New Orleans, La., and that application will accordingly be denied.

We also find, in No. MC-F-8808, that the transaction proposed has not been shown to be consistent with the public interest and that the application should be denied.

We further find, in No. MC-22167 (Sub-No. 21) that the public convenience and necessity has not been shown to require operation by Consolidated Copperstate Lines, as a motor common carrier of general commodities, with exceptions, over regular routes, between Houston, Tex., and New Orleans, La. and that application will accordingly be denied.

An appropriate order will be entered.

COMMISSIONER BROWN, dissenting:

I disagree with the majority and would approve the applications along the lines recommended by the hearing examiner. In my opinion these cases are being decided, at least to a great extent, upon technicalities or issues not raised by the parties. For example, the majority relies heavily upon its interpretation of section 307.5(c) of the Lease and Interchange of Vehicles Rules to find the Strickland–England interchange arrangement unlawful. At the same time, no thought has been given to section 307.5(a) of those rules, which provides that "the use to be made of the equipment and the consideration for such use" shall be set forth in the interchange agreement. While the report states that "England and Strickland have not offered lease agreements," the fact of the matter is that no one asked them to do so. I, therefore, would not condemn them for failing to fulfill a request that was never made.

The Copperstate cases likewise contain a vast amount of evidence which I believe warrants much better treatment than accorded by the majority.

In conclusion, I feel that substantial evidence was offered by applicants in these cases and that, contrary to the majority, it should not be treated as a porous product or one which will hold no more water than a crocheted bathtub.

CHAIRMAN TUCKER, whom COMMISSIONER DEASON and STAFFORD join dissent.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 31st day of July 1967.

No. MC-F-8798

STRICKLAND TRANSPORTATION CO., INC.—PURCHASE (PORTION)—ENGLAND TRANSPORTATION CO., INC.

No. MC-59680 (Sub-No. 142)

STRICKLAND TRANSPORTATION CO., INC., EXTENSION—NEW ORLEANS

No. MC-F-8808

CONSOLIDATED COPPERSTATE LINES—PURCHASE (PORTION)—ENGLAND TRANSPORTATION, INC., AND ENGLAND TRANSPORTATION COMPANY OF TEXAS

No. MC-22167 (Sub-No. 21)

CONSOLIDATED COPPERSTATE LINES, EXTENSION—NEW ORLEANS

Investigation of the matters and things involved in these proceedings having been made, and the said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereof, which report is hereby made a part hereof:

It is ordered, That the applications, be, and they are hereby, denied, and that this order shall be effective 60 days from the date it is served; and

It is further ordered, That the authority granted by the orders of September 30, 1964, in Nos. MC-F-8798 and MC-F-8808, as amended by orders of February 5 and 15, 1965, in No. MC-F-8798 and by

order of February 15, 1965, in No. MC-F-8808, for temporary lease of the operating rights of England Transportation Co., Inc., and of England Transportation Company of Texas, shall be of no further force and effect at the expiration of 60 days from the date this order is served.

By the Commission.

H. NEIL GARSON,

(SEAL) Secretary.

APPENDIX D

Commission Order on Petitions for Reconsideration

Service Date March 14, 1968

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of March, 1968.

No. MC-F-8798

STRICKLAND TRANSPORTATION CO., INC.—PURCHASE (PORTION)—ENGLAND TRANSPORTATION CO., INC.

No. MC-59680 (Sub-No. 142)

STRICKLAND TRANSPORTATION CO., INC., EXTENSION—NEW ORLEANS

No. MC-F-8808

CONSOLIDATED COPPERSTATE LINES—PURCHASE (PORTION)—ENGLAND TRANSPORTATION CO., INC., AND ENGLAND TRANSPORTATION COMPANY OF TEXAS

No. MC-22167 (Sub-No. 21)

CONSOLIDATED COPPERSTATE LINES, EXTENSION—NEW ORLEANS

Upon consideration of the record in the above-entitled proceedings and of:

1. Applicants' petitions, filed September 25, 1967, for reconsideration of the report and order, 104 M.C.C. 297, decided July 31, 1967, including requests for reopening for the purpose of receiving evidence tendered with the petitions, and for oral argument in support of the petitions;

2. Replies by protestants, (a) Arkansas-Best Freight System, Inc., (b) Gordons Transports, Inc., and Campbell Sixty-Six Express, Inc., (c) Ryder Truck Lines, Inc., (d) Central Freight Lines, Inc., Red Ball Motor Freight, Inc., and Saia Motor Freight Line, Inc., (e) Braswell Motor Freight Lines, Inc., and (f) Herrin Transportation Company;

3. Petition by Hill-Elliott, Inc., filed January 15, 1968, in No. MC-F8798, that it be substituted as the person in control of Strickland Transportation Company, Inc., transferee; and

It appearing, That except for editorial errors hereinafter corrected, the findings in the said report are in accordance with the evidence and applicable law; the petitions for reconsideration set forth no material facts or arguments in addition to those previously considered, nor adequate cause for reconsideration or further hearing; oral argument is not deemed necessary; and the petition to substitute parties would be mooted by denial of the application and petitions for reconsideration:

It is ordered, That the said report, 104 M.C.C. 297, decided July 31, 1967, be, and it is hereby, corrected as follows, said corrections to be reflected in the bound volumes of the Commission's reports:

a. Revise the last sentence of footnote 3 on page 304 to read as follows: "The lower court was reversed by the Supreme Court, in *American Trucking* v. *A.T. & S.F. R. Co.,* 387 U.S. 397, decided May 29, 1967."

b. Revise lines 1-10 of the last paragraph on page 319 to read as follows:

While it is true that the district court in reviewing the *Piggyback Rules* case did express its view that a certificate to operate over the highways as a motor carrier did not authorize, nor was it utilized by the use of, substituted TOFC service, we are not inclined to accept that interpretation in this context. Not only was the court's decision in the *Piggyback Rules* case reversed by the Supreme Court, but the right to utilize TOFC service for all or a portion of its lines-haul operations was expressly provided in Rule 4(e),[7] a rule which was not under attack in that review of the case.[8] More-

It is further ordered, That the said petitions, except the petition to substitute parties, be, and they are hereby, denied.

It is further ordered, That the petition to substitute parties be, and it is hereby, dismissed as moot.

It is further ordered, That the order of July 31, 1967, shall be effective 60 days from the date this order is served; and

It is further ordered, That the authority granted by the orders of September 30, 1964, in Nos. MC-F-8798 and MC-F-8808, as amended by orders of February 5 and 15, 1965, in No. MC-F-8798 and by order of February 15, 1965, in No. MC-F-8808, for temporary lease of the operating rights of England Transportation Co., Inc., and of England Transportation Company of Texas, shall be of no further force and effect at the expiration of 60 days from the date this order is served.

By the Commission.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX E

Statutes and Rules

1. Section 5(2) of the Interstate Commerce Act, in pertinent part, provides:

(2) Unifications, mergers, and acquisitions of control.

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to

the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others:

(1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

• • • •

2. Section 207 (a) of the Motor Carrier Act (Part II of the Interstate Commerce Act), 49 U.S.C. § 307 (a), provides:

§ 207. Issuance of certificate.

(a) Issuance authorized to qualified applicants for regular routes and between fixed termini.

Subject to section 210 of this Act, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

3. The Commission's Lease and Interchange of Vehicles Rules, 49 C.F.R. Part 1057, in pertinent part, provide:

PART 1057—LEASE AND INTERCHANGE OF VEHICLES

Sec.

1057.1 Applicability.
1057.2 Definitions.
1057.3 Exemptions.
1057.4 Augmenting equipment.
1057.5 Interchange of equipment.
1057.6 Rental of equipment to private carriers and shippers.

AUTHORITY: The provisions of this Part 1057 issued under sec. 204, 49 Stat. 546, as amended; 49 U.S.C. 304.

SOURCE: The provisions of this Part 1057 appear at 32 F.R. 20056, Dec. 20, 1967, unless otherwise noted.

§ 1057.1 [307.1]* Applicability.

The rules and regulations in this part apply to the augmenting of equipment by common and contract carriers of property by motor vehicle in interstate or foreign commerce subject to Part II of the Interstate Commerce Act, 49 U.S.C. 301 et seq.; to the interchange of equipment between such common carriers of property by motor vehicle, and to the lease of equipment by common and contract carriers of property by motor vehicle, with or without drivers, to private motor carriers and shippers.

§ 1057.2 [307.2] Definitions.

(a) *Authorized carrier.* A person or persons authorized to engage in the transportation of property as a common or contract carrier under the provisions of section 206,

* Former references, used in Commission's Report, in brackets.

207, or 209 of the Interstate Commerce Act, 49 U.S.C. 306, 307, or 309.

(b) *Equipment.* A motor vehicle, straight truck, tractor, semitrailer, full trailer, combination tractor-and-trailer, combination straight truck and full trailer, and any other type of equipment used by authorized carriers in the transportation of property for hire.

(c) *Interchange of equipment.* The physical exchange of equipment between motor common carriers or the receipt by one such carrier of equipment from another such carrier, in furtherance of a through movement of traffic, at a point or points which such carriers are authorized to serve.

* * * *

§ 1057.5 [307.5] Interchange of equipment.

Authorized common carriers may by contract, lease, or other arrangement, interchange any equipment defined in § 1057.2 [307.2] with one or more other such common carriers, or one of such carriers may receive from another such carrier, any of such equipment, in connection with any through movement of traffic, under the following conditions:

(a) *Interchange agreement to be specific.* The contract, lease, or other arrangement providing for interchange shall specifically describe the equipment to be interchanged; the specific points of interchange; the use to be made of the equipment, and the consideration for such use; and shall be signed by the parties to the contract, lease, or other arrangement, or their regular employees or agents duly authorized to act for them, in the execution of such contracts, leases, or other arrangements.

(b) *Operating authority of carriers participating in interchange.* The certificates of public convenience and neces-

sity held by the carriers participating in the interchange arrangement must authorize the transportation of the commodities proposed to be transported in the through movement and service from and to the point where the physical interchange occurs.

(c) *Through bills of lading required.* The traffic transported in interchange service must move on through bills of lading issued by the originating carrier, and the rates charged and revenues collected must be accounted for in the same manner as if there had been no interchange of equipment. Charges for the use of the equipment shall be kept separate and distinct from divisions of the joint rates or the proportions thereof accruing to the carriers by the application of local or proportional rates.

(d) *Safety inspection of equipment.* It shall be the duty of the carrier acquiring the use of equipment in interchange to inspect such equipment, or to have it inspected in the manner provided in § 1057.4(c) [307.4(c)] and equipment which does not meet the requirements of the safety regulations shall not be operated in the respective services of the interchange carriers until the defects have been corrected.

(e) *Identification of equipment as that of the operating carrier.* Authorized carriers operating power units in interchange service shall identify such equipment in accordance with the Commission's requirements in Part 1058 of this chapter (Identification of Motor Carrier Vehicles). Any removable device used to identify the operating carrier shall be on durable materials such as wood, plastic, or metal, and shall bear a serial number in the operating carrier's own series and such carrier shall keep a proper record of each identification device in use. The authorized carrier operating equipment under this part shall remove any legend, showing it as the operating carrier, displayed

on such equipment, and shall remove any removable device showing it as the operating carrier, before relinquishing possession of the equipment. Authorized carriers operating equipment in interchange service under this section shall carry with each vehicle so operated, except trailers and semitrailers, a copy of the contract, or other arrangement, while the equipment is being operated in the interchange service, unless a statement certifying that the equipment is being operated by it and identifying the equipment by company or State registration number, showing the specific point of interchange, the date and time of the assumption of responsibility for the equipment, and the use to be made of the equipment, is carried in the vehicle while it is operated in interchange service. Such statement shall be signed by the parties to the contract or other arrangement or their employees or agent.

(f) *Through movement involving more than two carriers, lessee considered as owner.* For the purpose of this section, a lessee of equipment on a through movement involving more than two carriers, shall be considered the owner of the equipment for the purpose of leasing the equipment for movement to destination or for return to the originating carrier.

• • • •

APPENDIX F

Sample Joint Tariff Notices

JOINT ROUTING CONCURRENCE

Date: April 16, 1962

Mr. A. B. Culbreth, Chief of Tariff Bureau
Southern Motor Carriers Rate Conference
P. O. Box 7347, Station C
Atlanta 9, Georgia

Gentlemen:

Please arrange to amend S. M. C. R. C. Tariff No. 166-G to provide specific routing between the carriers named below at the following interchange points:

SHREVEPORT, LOUISIANA

Issuing Carrier: STRICKLAND TRANSPORTATION CO., INC. (Item 30020)
P. O. Box 5689, Dallas 22, Texas
By: R. W. Collinsworth, General Traffic Mgr.
Signed: R. W. COLLINSWORTH

The above change is concurred in by:

Concurring Carrier: ENGLAND TRANSPORTATION COMPANY, INC. (Item 11345)
P. O. Box 1068
Address: New Orleans 4, Louisiana
By:
Signed: s/ [Illegible]
Date: APR 20 1962

NOTE: Concurring Carrier should mail original to Tariff Publishing Agency, duplicate to P. O. Box 5689, Dallas 22, Texas, and retain third copy.

JOINT ROUTING CONCURRENCE

Date: August 8, 1963

Mr. Harold Harvey, Chief of Tariff Bureau
THE EASTERN CENTRAL MOTOR CARRIERS
ASSOCIATION, INC., Agent
207 East Tallmadge Avenue
Akron 10, Ohio

Gentlemen:

Please arrange to amend ECMCA Tariff 26-I (Routing *Guide) to provide specific routing between the carriers* named below at the following interchange points:

Shreveport, La.

Issuing Carrier: STRICKLAND TRANSPORTATION CO., INC.
P. O. Box 5689, Dallas 2, Texas

By: R. W. Collinsworth, General Traffic Mgr.

Signed: R. W. COLLINSWORTH

The above change is concurred in by:

Concurring Carrier: ENGLAND TRANSPORTATION CO., INC.
P. O. Address: Box 3325, BYWATER STATION
City: NEW ORLEANS, 17, LA.

By: C. L. Callaway, President

Signed: C. L. CALLAWAY
Date: 8-12-63

NOTE: Concurring Carrier should mail original to Tariff Publishing Agency, duplicate to P.O. Box 5689, Dallas 2, Texas, and retain third copy.

APPENDIX G

Interchange Contract and Operating Procedures

1. *Interchange Contract*

STRICKLAND SYSTEM
3011 Gulden Lane
Dallas, Texas

TRAILER INTERCHANGE CONTRACT

We, the undersigned carriers, enter into this Contract governing our relationship with respect to interchange of trailers, and to make this Contract operative respecting interchange of individual trailers will cause to be executed the Interchange Receipts and Inspection Reports hereinafter mentioned. The term "trailer" as used in this Contract shall refer to any load-carrying vehicle without power.

1. At the time of each trailer interchange during the term of this Contract an authorized representative of each undersigned carrier shall execute, in multiple copies as the carriers may require, a Trailer Interchange Receipt and Inspection Report. The parties shall be bound by the notations on such Receipt and Inspection Reports hereafter executed and which are hereby expressly made a part of this Contract.

2. The carrier acquiring use of an interchange trailer, hereinafter called "Lessee," covenants and agrees with the carrier providing an interchanged trailer, hereinafter called "Lessor," to be bound by the following terms:

2.1. Lessee shall complete promptly and expeditiously the use for which the trailer has been interchanged and

return the trailer to the Lessor. Lessee accepts responsibility for return of interchanged trailers within a reasonable time to the Lessor.

2.2. Lessee shall be responsible to the Lessor of the trailer for the performance of this Contract by itself and by all other persons into whose possession such trailer may go until its proper return to the Lessor.

2.3. Lessee shall hold the Lessor harmless for any loss of or damage to the interchanged trailer and from all liability for damages to persons or property, other than that being transported therein, arising out of the use, operation, maintenance or possession of said trailer, or arising from any other cause, until said trailer has been returned to the Lessor and receipt issued therefor.

3. The Lessor covenants and agrees with the Lessee to be bound by the following terms:

3.1. Lessor shall equip the interchanged trailer with tires and tubes of proper size and with sufficient tread to assure safe and timely travel for the complete round trip contemplated. Thereafter, until the trailer is returned to the Lessor, repairs to tires and tubes shall be made by and at the expense of the carrier using the trailer at the time of such tire failure. In the event of a blowout or total failure of a tire or tube, the carrier in possession of the trailer shall furnish replacement tires and tubes to return the trailer to the carrier from whom the trailer was received, but shall retain such replacement tires and tubes upon re-delivery of the trailer to such carrier and shall return the blown-out or unserviceable tire and tube properly identified to Lessor at the point of interchange of said trailer.

In the event of failure to so return the blown-out or unserviceable tire and tube, payment therefor shall be made at the value thereof at the time of interchange.

3.2. Lessor shall equip the interchanged trailer with such safety and electrical equipment, in proper working condition, as required by the laws and regulations governing such interchanged trailer at the point of interchange, including, but not limited to, flashing turn signals with not less than twelve square inches of lens surface in proper working condition.

3.3 Lessor does not make any warranty or representation, express or implied, as to the fitness or condition of the trailer so interchanged, including tires and tubes, and the carrier acquiring the use thereof does so at its own risk.

4. Interchange will be made on a trailer for trailer exchange, with each carrier exchanging a trailer of like size and condition.

5. In the event an interchanged trailer requires repair or service while in the possession of the Lessee, and such repair or service is required only as ordinary wear and tear as distinguished from damage to such trailer, the Lessee shall cause the repair or service to be performed and the Lessee shall absorb as its expense all such costs up to and including $25.00. In the event such repair or service exceeds $25.00, the Lessee shall charge back to the Lessor all such charges; provided, however, the Lessee shall first obtain consent from the Lessor for any charge or charges totaling more than $25.00 to any such interchanged trailer.

In the event an interchanged trailer is damaged, other than as provided for in the preceding paragraph, the car-

rier in possession at the time the damage occurred shall, by repair, restore it to the condition in which it was received and, in the event of failure of such carrier to make such repair, it shall, nevertheless, be responsible for the cost of such repairs. If the interchanged trailer is totally destroyed or damaged beyond reasonable repair, the Lessee shall retain the damaged trailer and pay Lessor the replacement value thereof.

6. This Contract and the Trailer Receipt and Inspection Reports shall constitute the entire agreement between the parties and no verbal amendment or modification thereof shall be permitted. This Contract may be supplemented or amended only by a written instrument containing such supplement or amendment.

7. This Contract is for a period of one year from date hereof, and shall continue in effect from year to year thereafter until terminated by the parties. Either party to this Contract may terminate same as of any time by giving the other party ten days notice in writing of such termination by registered United States Mail addressed to the other party at its last known mailing address.

Executed at Dallas, Texas, this 27 day of Nov. 1962
Strickland Transportation Co., Inc. Certificate No. .....
By: (Illegible), Operating Manager.

Executed at New Orleans, this 27 day of Nov. 1962
England Transportation Co. Certificate No. .....
By: C. L. CALLAWAY, President.

2. *Operating Procedures*

July 23, 1962
New Orleans, La.

Mr. El Roy Miller, Outbound Dock Foreman,
New Orleans, La.

Mr. J. E. Smith, Terminal Manager

Effective Monday night, July 23rd, and each week-day night Monday through Friday, we will have a schedule that will be loaded for St. Louis and beyond which will be transferred over the road by means of England Transportation, who will pick up this unit at our terminal at or around 8:30 P.M.

The following is a list of instructions that you are to see are completed, and should there be any questions regarding this, please contact the writer.

No. 1. You are to see that the load is properly braced, blocked, broken down, and sealed.

No. 2. You are to make a trailer interchange report showing any discreprancy and secure signature of England's driver. You will be supplied with an envelope containing the freight bills, bearing on it the trailer number, seal number, and destination, which will be prepared by our billing department.

No. 3. You will be supplied with a delivery receipt, or dead-head billing, that will be made out from Strickland-New Orleans to Strickland-Shreveport, bearing on same the trailer number, seal number, and weight, which you are to secure signature of Eng-

land's driver upon same, giving to the England driver one copy of the bill, along with the sealed envelope.

Please comply with the above instructions.

Very truly yours,

s/ J. E. SMITH
J. E. Smith—Terminal Manager

JES:gp
cc: Mr. Irby Gomez, Office Manager

* * * * *

July 23, 1962
New Orleans, La.

Mr. Clinton Hathaway, Inbound Dock Foreman,
New Orleans, La.
Mr. J. E. Smith, Terminal Manager

You will start receiving on Wednesday, July 25th, a trailer from England Transportation at approximately 3:00 A.M., which will be a St. Louis schedule, and which schedule you should receive each day following for five days of the week at or around three A.M. on Mondays through Fridays.

Following is a list of instructions that are to be followed, and should there be any questions on this, please contact the writer.

No. 1. England will cut a dead-head bill covering the load and you will sign their delivery receipt.

No. 2. Make a trailer inspection report and secure signature of England's driver on same.

No. 3. Check seal to see that the one applied at St. Louis, that will recorded on the envelope containing the bills, is one and the same.

Please see that these instructions are followed as outlined above.

Very truly yours,

s/ J. E. SMITH
J. E. Smith—Terminal Manager

JES:gp
cc: Mr. Irby Gomez, Office Manager

* * * * *

July 23, 1962
New Orleans, La.

Mr. Charles Holmes, Rate Clerk, New Orleans, La.
Miss Jo Hogancamp, Billing Clerk, New Orleans, La.
Mr. J. E. Smith, Terminal Manager

Effective Monday, July 23rd, and each successive weekday night, that being Monday through Friday, we will have a load that will be loaded for St. Louis and beyond, which will be transported over the road via Shreveport Terminal in connection with England Transportation.

The following is a list of instructions that will be followed, and should there be any questions regarding this, please contact the writer.

/

No. 1. After all bills are prepared you are to see that all copies of the freight bills are stamped with the rubber stamp that is being supplied to you this date, reading "STCO NOLA ENGLAND SHREVEPORT STCO".

No. 2. All bills are to be manifested, showing the freight bill number, the shipper, the consignee, weight, and destination.

No. 3. All number six (6), or consignee's copy, of each freight bill is to be pulled and mailed, along with a copy of the manifest, to the attention of Mr. Callaway, England Transportation, Box 3327, New Orleans 17, Louisiana.

No. 4. One copy of the manifest, along with the bills, will be placed in an envelope that is to be sealed, and upon the envelope place the trailer number, the destination, and seal number.

No. 5. One copy of the manifest is to be forwarded to Mr. M. H. Burcham, Comptroller, Strickland Transportation Co., P. O. Box 5689, Dallas, Tex.

No. 6. You are to prepare a freight bill showing shipper as Strickland Transportation, New Orleans, consignee, Strickland Transportation, Shreveport, the route to be shown as Strickland-New Orleans-England-Shreveport-Strickland, and this freight bill is to show one trailer load of mixed freight, the weight of the entire load, the trailer number, and the seal number.

No. 7. You are to give the bills and manifests, which are in a sealed envelope, and the dead-head freight bill,

to the Outbound Dock Foreman, Mr. Miller, as soon as you have this completed, and he will further handle.

Your cooperation in following the above instructions will be appreciated.

Very truly yours,

s/ J. E. Smith
J. E. Smith—Terminal Manager

JES:gp
cc: Mr. Irby Gomez, Office Manager, New Orleans, La.

LIBRARY
SUPREME COURT, U. S.

FILED
MAR 21 1969
JOHN F. DAVIS, CLERK

No. 1128

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

CONSOLIDATED COPPERSTATE LINES, *Appellant*

vs.

THE UNITED STATES OF AMERICA ET AL., *Appellees*

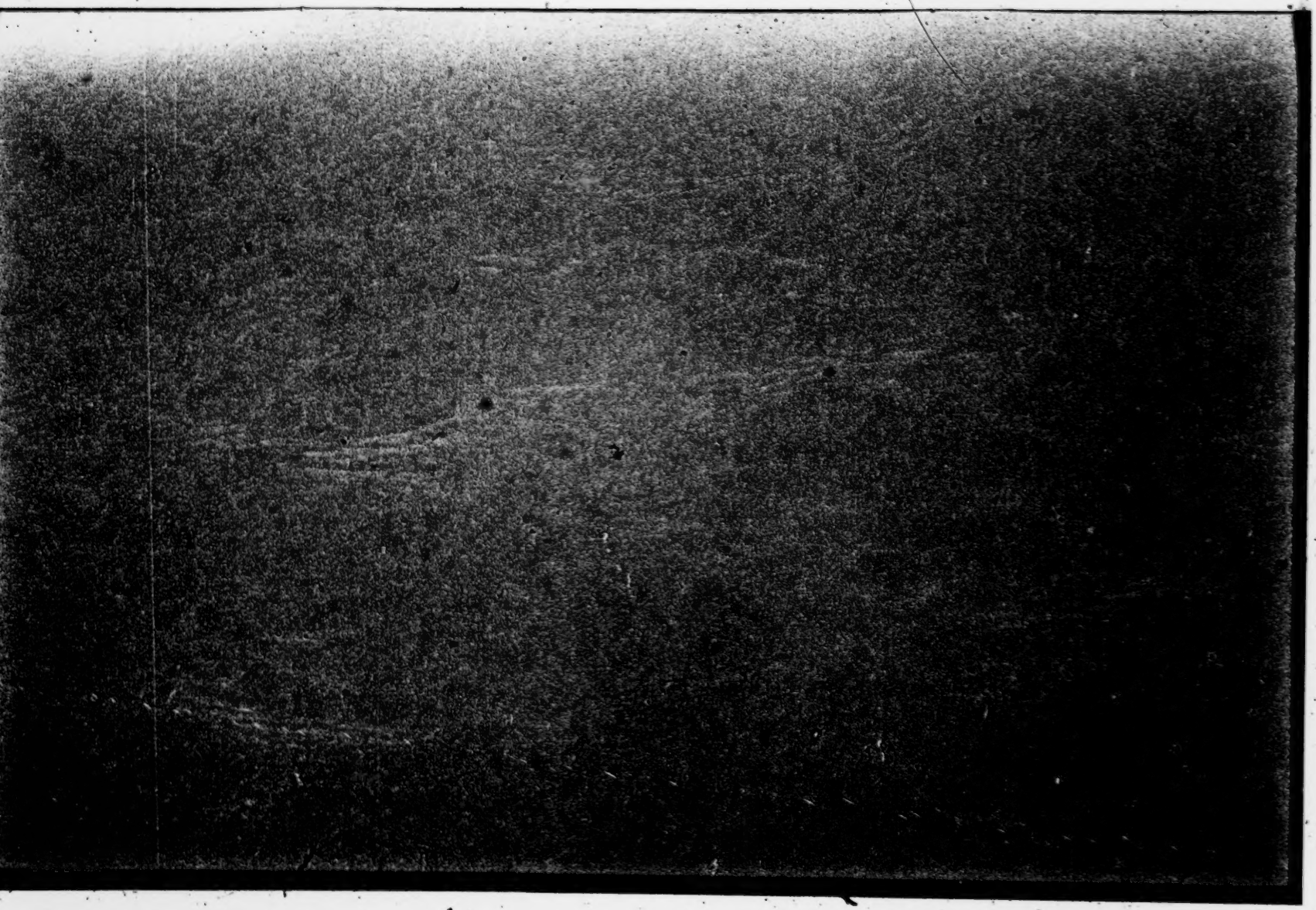
On Appeal From The United States District Court For
The Central District of California

Motion To Affirm

REAGAN SAYERS
Century Life Building
P. O. Box 17007
Fort Worth, Texas 76102
Counsel for Ryder Truck Lines, Inc., Appellee

CLAYTE BINION, III and
RAWLINGS, SAYERS & SCURLOCK
Century Life Building
P. O. Box 17007
Fort Worth, Texas 76102
Of Counsel

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone ED 2-4070



No. 1128

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

CONSOLIDATED COPPERSTATE LINES, *Appellant*

vs.

THE UNITED STATES OF AMERICA ET AL., *Appellees*

On Appeal From The United States District Court For
The Central District of California

Motion To Affirm

Pursuant to Rule 16.1.(c), THE SUPREME COURT OF THE UNITED STATES REVISED RULES (1967), Ryder Truck Lines, Inc., Appellee, moves that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a final judgment (J. S. App. A 1-5) of a three-judge District Court affirming orders of the Interstate Commerce Commission (J. S. App. B 6-52) in an action brought by appellant to set aside such orders. The Commission's orders denied, under Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), the acquisition by appellant of a portion of the certificated motor common carrier oper-

ating rights of England Transportation Company, a Louisiana corporation, and England Transportation Company of Texas, a Texas corporation, and under Section 207 of the Interstate Commerce Act, 49 U.S.C. § 307, a certificate of public convenience and necessity to conduct motor common carrier operations over regular routes similar to the operating rights sought to be acquired as aforesaid, all generally between New Orleans-Baton Rouge, La. and Houston, Tex. The principal bases in the entire Commission's denial (J. S. App. B 6-52) were (1) the "substantial unauthorized" operation conducted by appellant and the England companies; (2) the "greatly differing use" to which appellant would put the involved operating rights following approval of the transfer; (3) much of the traffic which appellant would and has generated is at the expense of existing carriers, and particularly this appellee Ryder Truck Lines, Inc. showed that a substantial amount of traffic which it formerly received in interline at Houston from appellant had been diverted to the latter's single line service under temporary authority; and (4) the lack of need shown for the extension of appellant's authority, coupled with the questionable aspect of its fitness in conducting temporary operations impelled the Commission to deny the application for the new authority sought under Section 207 of the Interstate Commerce Act.

Chronologically and pertinent hereto:

(1) In October 1964 the Commission granted temporary authority "pending the determination" by the Commission of the application for appellant to purchase such operating rights.

(2) Operations under such *temporary* authority were commenced October 28, 1964 by appellant and have been continued until this date.

(3) Applications under 49 U.S.C. § 5 to purchase such operating rights (finance application) and under 49 U.S.C. § 307(a) (extension application) were prosecuted on joint hearings, protested by carrier appellees, and continuing for many weeks, with over 150 witnesses, 229 exhibits, and 4,000 pages of transcript in the record. The hearing examiner recommended the grant of the application (J. S. App. C).

(4) After consideration of the record, the numerous briefs and the pleadings of all of the parties, the *entire* Commission denied the two applications July 31, 1967, finding that the approval of the finance application would not be consistent with the public interest, and that the public convenience and necessity did not require the grant of the extension application (J. S. App. B). After the consideration of petitions for reconsideration and replies, on March 4, 1968 the Commission adopted its prior report and affirmed its prior denials (J. S. App. D).

(5) Appellant appealed to the United States District Court for the Central District of California. Such court granted a temporary restraining order against the enforcement of such order of denial, pending trial on the merits before the three-judge court, thereby in

practical effect keeping in force and effect the "temporary authority" theretofore granted by the Commission and staying the denial thereof.

(6) After the filing of briefs, trial and argument, on December 2, 1968 the three-judge District Court affirmed the Commission's denial in a unanimous opinion (J. S. App. A).

(7) On December 12, 1968 the Commission entered its order giving effect to the decision of the three-judge court and making effective the Commission's prior denial as of February 10, 1969.

(8) Appellant sought a stay from the three-judge court pending appeal to this Court, which was denied, after consideration of briefs by that court, on January 27, 1969.

(9) Upon consideration of the application of counsel for appellant and of the opposition of certain appellees, including appellee Ryder, thereto, on February 4, 1969, Mr. Justice Harlan issued his memorandum and order staying the order of the Commission of December 12, 1969, pending this Court's action on the Jurisdictional Statement, conditioned upon appellant perfecting its appeal and the filing of its Jurisdictional Statement of March 10, 1969, ordering that if the appeal is dismissed or the judgment summarily affirmed, such stay shall expire immediately, but should the Court note probable jurisdiction or postpone consideration of the jurisdictional aspect until the hearing of the

cases on the merits, further applications for a stay pending disposition of the appeal may be filed for the consideration of the entire Court within one week thereafter.[1]

ARGUMENT

The decision below is correct, and the case presents no question substantial enough to warrant plenary consideration by this Court.

1. In a determination whether an acquisition subject to Section 5(2) should be approved as consistent with the public interest, "[t]he statute entrusts the Commission with the duty to decide what considerations . . . shall be given weight." *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 127; *McLean Trucking Co. v. United States*, 321 U.S. 67, 86-88; *Schwabacher v. United States*, 334 U.S. 182, 193. As in the case of the extension application for a certificate under Section 207 of the Interstate Commerce Act, the Commission chose to give weight to the applicant's fitness, which it might lawfully do. *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 127. The Commission found here in the Section 5(2) application that operations engaged in by the England companies for which it held no operating authority were unlawful and may not be considered (J. S. App. B 41); that appellant had operated for a brief period following the initiation of temporary operation un-

[1] This order relates also to *Strickland Transportation Company, Inc. v. United States of America et al.*, No. 1141, Oct. 1968 Term of this Court, but this appellee Ryder is not a party to such proceedings before either the Commission, the three-judge court, nor this Court, having no justiciable interest therein.

lawfully, and there is an inference that it continued to do so (J. S. App. B 41); that both the England companies and appellant had "operated an unlawful cross-radial haul of New Orleans on traffic bound from Baton Rouge to Houston," that such "conduct of an operation for which no authority exists, and in addition, the brash statement of its intention to continue the unlawful movement constitutes a willful and defiant disregard for regulation which brings the fitness of" appellant "into question" (J. S. App. B 42, 43). It also found that on the basis of the use to which the operating rights sought by appellant were put by the England companies prior to the transaction, coupled with the substantial unauthorized carriage both before and during temporary authority, and the greatly differing use to which those rights would be put following approval, the transaction would not be in the public interest and will be denied (J. S. App. B 43). The court below held that in a § 5 proceeding, the burden is upon the applicant (appellant) to show that a new service will not be created, and that if a new competitive service was thereby created, then the applicant (appellant) must present proof under a separate § 207 application that the public convenience and necessity requires the granting of the application (J. S. App. A 4, 5). There is no basis for this Court to depart from its general rule aforesaid that the Commission shall be the arbiter of the considerations, particularly when this Court has heretofore approved the considerations here made by the Commission of illegality and resulting new service.

2. Appellant complains (J. S. App. A 9-12) that

the Commission compartmentalized and segregated the evidence in the § 5 finance application from the evidence in the § 207 extension of operating rights application and did not consider past user of appellant under temporary authority nor consider all of the evidence and the record as a whole in the disposition of both applications. Such complaint is contrary to the Commission disposition, as the Commission adopted stated rationale in the disposition of both applications. The court below correctly held (J. S. App. A 5) that the Commission considered the applications in one report and order and "did not separate item by item the findings in regard to each application," that the method of drafting the report cannot be fatal to the Commission's orders, that form does not govern substance, and "the Commission's findings in the § 207 proceeding are fully applicable to the same issues in the § 5 matters." Indeed the Commission's report made this integrated consideration of all of the evidence in both applications clear by first considering in the § 5 application *inter alia* the illegality of appellant's operations and the resulting different use of the involved operating rights proposed by appellant as bearing on the statutory concept of public interest (J. S. App. B 41-43); secondly considering in the § 207 application that the public convenience and necessity has not been shown for the institution of such service by appellant, nor have the supporting shippers shown a need for any service that cannot be supplied by existing carriers, and that much of the traffic which appellant would generate would be at the expense of existing carriers, particularly this appellee Ryder (J. S. App.

B 47); and then concluding (J. S. App. B 48):

> "The lack of need shown for an extension of Copperstate's authority, coupled with the questionable aspect of its fitness in conducting temporary operations impel us to deny the application for new authority under section 207."

Thus, the Commission considered *both* the § 5 and the § 207 evidence and then grouped such for final disposition upon its stated considerations. Clearly the decision and orders were predicated on stated rationale grounded on basic and essential findings of fact and conclusions of law, and appellant's objection to the form of the report is without effect. *Interstate Commerce Commission v. Parker*, 326 U.S. 60 (1945); *Gilbertsville Trucking Co. v. United States*, 371 U.S. 115 (1962); *Rochester Telephone Co. v. United States*, 307 U.S. 125 (1939).

3. Appellant complains (J. S. 12-15) that the Commission adopted standards in the determination of appellant's applications differing from those in *Consolidated Freightways Corp. of Del-Control-Southern Plaza Exp., Inc.*, 104 MCC 194, thereby resulting in arbitrary and capricious action herein, relying on *Acme Cartage Co. v. United States*, 290 F. Supp. 453 (D.C. Wash. 1968) [related to unpredictable enforcement of *rules* in which no discretion was involved as in the decisional process here] and *NLRB v. Mall Tool Co.*, 119 F. 2d 700, 702 (C.A.-7 1941) [related to proceedings under National Labor Relations Act for loss of employee wages on the basis of a stated decisional policy of the NLRB]. *Mall* was the basis for the lower

court overturning a Commission's order as reaching different results in other applications in *Dixie Highway Exp. v. United States*, 242 F. Supp. 1016 (S.D. Miss. E.D. 1965), 268 F. Supp. 239 (S.D. Miss. E.D. 1967), rev. by this Court 389 U.S. 409 (1967). The doctrines of res judicata, stare decisis and equitable or collateral estoppel do not apply to decisions of the Commission, and the Court is not concerned with decisional consistency by the Commission. *Virginian R. Co. v. United States*, 272 U.S. 658, 666 (1926); *Western Paper Makers' Chemical Co. v. United States*, 271 U.S. 268, 271 (1926).

4. The summation of all complaints of appellant is that it is dissatisfied with the conclusion reached by the Commission and the court below on the evidence. The Commission, not the courts, is the arbiter of the evidence, and where, as here, the findings of fact and conclusions of law are predicated on stated criteria adhered to, this Court has not interfered with the proper exercise of Commission discretion. *United States v. Pierce Auto Freight Lines*, 327 U.S. 515 (1946); *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U.S. 541 (1912); *Rochester Telephone Co. v. United States*, 307 U.S. 125 (1939).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

REAGAN SAYERS
Century Life Building
P. O. Box 17007
Fort Worth, Texas 76102
Counsel for Ryder Truck Lines, Inc., Appellee

CLAYTE BINION, III and
RAWLINGS, SAYERS & SCURLOCK
Century Life Building
P. O. Box 17007
Fort Worth, Texas 76102
Of Counsel

DATED: March 1969.

LIBRARY
REME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 28 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1128

CONSOLIDATED COPPERSTATE LINES, *Appellant*

vs.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; ARKANSAS-BEST FREIGHT SYSTEM, INC.; GORDONS TRANSPORTS, INC.; BRASWELL MOTOR FREIGHT LINES, INC.; CENTRAL FREIGHT LINES, INC.; RED BALL MOTOR FREIGHT, INC.; SAIA MOTOR FREIGHT LINES, INC.; HERRIN TRANSPORTATION CO.; and RYDER TRUCK LINES, INC., *Appellees*

On Appeal From The United States District Court For The Central District of California

Motion To Affirm

MAURICE E. HIBBERT
WARREN N. GROSSMAN
KNAPP, GILL, HIBBERT & STEVENS
825 City National Bank Building
606 South Olive Street
Los Angeles, California 90014

LAWRENCE A. WINKLE
BRASWELL MOTOR FREIGHT LINES, INC.
Post Office Box 3989
Dallas, Texas 75208

M. WARD BAILEY
T. S. CHRISTOPHER
CHRISTOPHER, BAILEY & TAYLOR
2412 Continental Life Building
Fort Worth, Texas 76102
Attorney for Appellee, Braswell Motor Freight Lines, Inc.

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone ED 2-4070

INDEX

	Page
MOTION TO AFFIRM	1
STATEMENT OF THE CASE	2
AUTHORITIES AND ARGUMENT	5
CERTIFICATE OF SERVICE	8

INDEX OF AUTHORITIES

Page

Alton R. Co. vs. United States, 315 U.S. 15 5

Gilbertsville Trucking Company vs. United States, 371 U.S. 115 5

Interstate Commerce Commission vs. Parker, 326 U.S. 60 5

Mississippi Valley Barge Line Co. vs. United States, 292 U.S. 282 5

Rochester Telephone Corp. vs. United States, 307 U.S. 125 5

United States vs. Detroit and C. Nav. Co., 326 U.S. 236 5

U. S. vs. Pierce Auto Freight Lines, 327 U.S. 515, 536 5

Virginian R. Co. vs. United States, 272 U.S. 658, 668 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1128

CONSOLIDATED COPPERSTATE LINES, *Appellant*

vs.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; ARKANSAS-BEST FREIGHT SYSTEM, INC.; GORDONS TRANSPORTS, INC.; BRASWELL MOTOR FREIGHT LINES, INC.; CENTRAL FREIGHT LINES, INC.; RED BALL MOTOR FREIGHT, INC.; SAIA MOTOR FREIGHT LINES, INC.; HERRIN TRANSPORTATION CO.; and RYDER TRUCK LINES, INC., *Appellees*

On Appeal From The United States District Court For The Central District of California

Motion To Affirm

Pursuant to Rule 16.1(c) of the Rules of this Court, intervening defendant, Braswell Motor Freight Lines, Inc., appellee herein, hereafter called appellee or Braswell, moves to affirm the judgment of the United States District Court, Central District of California[1], a statutory court of three Judges[2], affirming the decision of the Interstate Commerce Commission[3], and as grounds for such motion says:

THAT IT IS MANIFEST THAT THE QUES-

[1] Not yet reported but copy attached to Appellant's Jurisdictional Statement as Appendix A.

[2] An action under 28 U.S.C. 1336, 1398, 2284, 2321-2325.

[3] Reported at 104 M.C.C. 297.

TIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

STATEMENT OF THE CASE

The statement of the case as made by the court below is so accurate and comprehensive that we here adopt it as follows:

"Primarily involved are the purchases of operating rights of two companies, England Transportation Company, a Louisiana corporation, and England Transportation Company of Texas, a Texas corporation. These two companies ceased operations in 1964 due to failure to consummate a new labor agreement, and they placed their operating authority and equipment for sale at public auction. The plaintiffs, Consolidated Copperstate Lines and Strickland Transportation Co., Inc., were two successful bidders.

"The statutes involved are §§5(2)(a)(i), 5(2)(b), 207 and 210a(b) of the Interstate Commerce Act [49 U.S.C. §§5(2)(a)(i), 5(2)(b), 307 and 310a(b)].

"Section 5(2)(a) provides the basic permissibility for carriers to acquire control of other carriers.

"Section 5(2)(b) sets forth procedures and standards for Commission approval of such transactions.

"Section 207 provides for the grant of a certificate authorizing common carrier operation upon suitable findings of the public convenience and necessity.

"Section 210a(b) provides for the issuance of tem-

porary authority for one motor carrier to operate or lease the rights of another carrier.

"In its §5 purchase application, Copperstate sought to obtain through the purchase of a portion of the rights of England Transportation Company of Louisiana (England, La.), and England Transportation Company of Texas (England, Tex.), more direct routes from its western and southwestern service territory to points in Texas and to penetrate the New Orleans, Louisiana, service territory by providing service between New Orleans and Houston, Texas. Copperstate also filed an application for authority under §207 for an extension of the rights it sought to acquire.

"By its §5 purchase application, Strickland[4] sought to obtain through the purchase of England (La.) a competitive, direct north-south route between its present east and northern service territory, on the one hand, and, on the other, New Orleans—from Texarkana, Texas, through Shreveport, Louisiana. Also, in a §207 application, Strickland sought to convert a portion of the England (La.) rights from irregular-route authority to regular-route authority.

"Temporary authority to operate the rights of the England Companies was granted by the Commission in September 1964 and both Strickland and Copperstate commenced operation the following month.

---

[4] Strickland Transportation Company, Inc., appeal to this Court is pending under this Court's Docket No. 1141. They are companion cases decided by the Commission in one report and order and determined by the District Court, Central District of California (a statutory court) in one decision.

"Both Copperstate and Strickland sought approval before the Commission and were given temporary authority to operate under the England rights pending final order of the Commission. The hearing examiner recommended, generally, approval of the applications, but the Commission, with four dissenters, denied the applications. In reversing the examiner's recommendation, the Commission, upon substantial evidence, found (1) that both Copperstate and Strickland were relying on past operations unlawfully performed by the England Companies in violation of the terms of their certificates, (2) that to the extent such past operations had been unlawfully performed, they would not be considered as probative of the public interest, (3) that both Copperstate and Strickland, as well as the England Companies, had performed so-called cross-hauling in violation of their certificates, (4) that Strickland had unlawfully managed and controlled certain rights of England (La.) prior to the Commission's approval of the temporary lease arrangement, (5) that both purchase proposals were so different from that service lawfully rendered as to constitute a new service for which the public convenience and necessity must be proved, (6) that neither carrier had borne its burden of proof in showing a need for the new services, and (7) that neither Strickland nor Copperstate was entitled to any special consideration under the doctrine of color-of-right or because of an overriding public interest.

"Before the Commission's orders became effective, this action was filed. A temporary injunction and

interlocutory judgment have stayed the effective date of the Commission's orders."

AUTHORITIES AND ARGUMENT

Appellant presents three questions which appellant says are so substantial as to require "plenary" consideration by this Court. The fact is, however, that each question presented (J.S. p. 3) involves fact issues, all of which were fairly and reasonably determined by the Interstate Commerce Commission. Appellant's argument as to all three alleged substantial questions clearly shows that the only thing involved here is appellant's disagreement with the Commission about the facts.

But what appellant overlooks or chooses to ignore is that the Commission is the final arbiter of the facts and the conclusions to be drawn therefrom, for Congress has intrusted that function and duty to the Commission, not the courts. In a case of this kind, judicial review is "limited to consideration of whether they have a rational basis and are supported by substantial evidence." *Gilbertsville Trucking Company vs. United States*, 371 U.S. 115; *U. S. vs. Pierce Auto Freight Lines*, 327 U.S. 515, 536; *Interstate Commerce Commission vs. Parker*, 326 U.S. 60; *United States vs. Detroit and C. Nav. Co.*, 326 U.S. 236; *Alton R. Co. vs. United States*, 315 U.S. 15; *Rochester Telephone Corp. vs. United States*, 307 U.S. 125; *Mississippi Valley Barge Line Co. vs. United States*, 292 U.S. 282; and many others. And of course the court may not substitute its own findings and judgment for

that of the Commission. That very thing is exactly what appellant here seeks.

In appellant's third question, asserted to be of substantial importance, it said that the Commission "acted arbitrarily in failing to follow the guidelines set forth in Consolidated Freightways Corporation of Delaware—Control—Southern Plaza Express, Inc., 104 M.C.C. 194." (J.S. p. 3).

We suppose that this is asserted as a conflict of decision relied upon to give this Court jurisdiction. But this overlooks the fact that cases of this kind are determined on the facts of each particular case and the conclusions to be drawn therefrom.

In any event, "The argument urged . . . is appropriate for consideration by the Commission and has presumably been duly considered by it. The fact that it has not proved persuasive *affords no basis for the contention that the Commission's action in making the order was arbitrary or otherwise illegal.*" *Virginian R. Co. vs. United States*, 272 U.S. 658, 668.

Again in *Virginian R. Co.'s* case, supra, this Court said: "This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, *or with the alleged inconsistency* with findings made in other proceedings before it."

All of appellant's complaints merely show that it is dissatisfied and quite unhappy with the findings and conclusions of the Commission and of the trial court, but, as heretofore pointed out, the Commission, not the courts, is the arbiter of evidence and where, as

here, the findings of fact, supported by evidence, and the conclusions are based upon statutory criteria (and the overriding National Transportation Policy), this Court has never interferred with the Commission's orders. Authorities as cited supra.

Appellee, Braswell Motor Freight Lines, Inc., respectfully submits that the judgment of the District Court should be affirmed, and so prays.

Respectfully submitted,

MAURICE E. HIBBERT
WARREN N. GROSSMAN
KNAPP, GILL, HIBBERT
& STEVENS
825 City National Bank Building
606 South Olive Street
Los Angeles, California 90014

LAWRENCE A. WINKLE
BRASWELL MOTOR FREIGHT
LINES, INC.
Post Office Box 3989
Dallas, Texas 75208

M. WARD BAILEY
T. S. CHRISTOPHER
CHRISTOPHER, BAILEY
& TAYLOR
2412 Continental Life Building
Fort Worth, Texas 76102

Attorney for Appellee,
Braswell Motor Freight Lines, Inc.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1968

NO. 1128

CONSOLIDATED COPPERSTATE LINES,
Appellant

VS.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
ARKANSAS-BEST FREIGHT SYSTEM, INC.,
GORDONS TRANSPORTS, INC.,
BRASWELL MOTOR FREIGHT LINES, INC.,
CENTRAL FREIGHT LINES, INC.,
RED BALL MOTOR FREIGHT, INC.,
SAIA MOTOR FREIGHT LINES, INC.,
HERRIN TRANSPORTATION CO., and
RYDER TRUCK LINES, INC.,
Appellees.

CERTIFICATE OF SERVICE

I, T. S. Christopher, attorney for Appellee, Braswell Motor Freight Lines, Inc., and a member of the Bar of this Court, do hereby certify that I have this day served the Motion to Affirm of Braswell Motor Freight Lines, Inc., upon the parties to this action by mailing copies thereof to:

The Solicitor General
Department of Justice
Washington, D. C. 20530

as service upon the Appellee, United States of America; to

Robert E. Ginnane, Esquire
Nahum Litt, Esquire
Office of the General Counsel
Interstate Commerce Commission
Washington, D. C. 20423

as service upon Appellee, Interstate Commerce Commission; to

Dennis G. Lyons, Esquire
1229 Nineteenth Street, N. W.
Washington, D. C. 20036

as service upon Strickland Transportation Company, intervening plaintiff below; to

Reagan Sayers, Esquire
Clayte Binion, Esquire
Rawlings, Sayers & Scurlock
Century Life Bldg.
Post Office Box 17007
Fort Worth, Texas 76102

as service upon Appellee, Ryder Truck Lines, Inc., to

Phineas Stevens, Esquire
Suite 700—Petroleum Bldg.
Post Office Box 1250
Jackson, Mississippi 39205

and to

James Wrape, Esquire
Robert E. Joyner, Esquire
2111 Sterick Building
Memphis, Tennessee 38103

as service upon Appellees Arkansas-Best Freight System, Inc., and Gordons Transports, Inc.; to

Mert Starnes, Esquire
James, Robinson, Felts & Starnes
The 904 Lavaca Building
Austin, Texas 78701

as service upon Appellees Central Freight Lines, Inc., Red Ball Motor Freight, Inc. and Saia Motor Freight Lines, Inc.; to

Leroy Hallman, Esquire
William E. Livingstone, III, Esquire
Phinney, Hallman, Pulley & Livingstone
4555 First National Bank Building
Dallas, Texas 75202

as service upon Appellee, Herrin Transportation Company; to

W. D. Beatenbough, Esquire
Vice-President-Traffic
Ryder Truck Lines, Inc.
Post Office Box 2408
Jacksonville, Florida 32203

to

Charles L. Ford, Esquire
Texas Railroad Association
Post Office Box 1767
Austin, Texas 78767

to

Rollo E. Kidwell, Esquire
Post Office Box 10125
Dallas, Texas 75207

to

Charles D. Mathews, Esquire
Post Office Box 47407
Dallas, Texas 75247

to

Hugh T. Matthews, Esquire
Brooks, Montgomery & Matthews
630 Fidelity Union Tower
1507 Pacific Street
Dallas, Texas 75201

to

Franklin H. Wilson, Esquire
McCutchen, Black, Verleger & Shea
615 South Flower Street
Los Angeles, California 90017

and to

Theodore W. Russell, Esquire
Robert Y. Schureman, Esquire
1545 Wilshire Boulevard
Los Angeles, California 90017

as additional service upon various of the aforesaid Appellees; to

David Axelrod, Esquire
Axelrod, Goodman & Steiner
39 South LaSalle Street
Chicago, Illinois 60603

and to

Ball, Hunt, Hart & Brown
120 Linden Avenue
Long Beach, California 90802

as service upon Appellant, Consolidated Copperstate Lines; and I do further certify that such mailing was made, postage prepaid, this 27 day of March, 1969.

T. S. CHRISTOPHER
2412 Continental Life Bldg.
Fort Worth, Texas 76102
Attorney for Appellee,
BRASWELL MOTOR FREIGHT
LINES, INC.

LIBRARY
EME COURT U. S.

Office-Supreme Court, U.S.
FILED
APR 3 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

NO. 1128

CONSOLIDATED COPPERSTATE LINES,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

On Appeal From The United States District Court For The Central District of California

MOTION TO AFFIRM

Phillip Robinson
Mert Starnes
JAMES, ROBINSON, FELTS & STARNES
The 904 Lavaca Building
Austin, Texas 78701

Attorneys for Appellees
Central Freight Lines Inc.
Red Ball Motor Freight, Inc
Saia Motor Freight Line, Inc.

FIRM FOUNDATION—AUSTIN

IN THE

Supreme Court of the United States

October Term, 1968

NO. 1128

CONSOLIDATED COPPERSTATE LINES,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

On Appeal From The United States District Court For The Central District of California

---

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) appellees Central Freight Lines Inc., Red Ball Motor Freight, Inc., and Saia Motor Freight Line, Inc., move that the judgment of the district court be affirmed because it is manifest that the questions presented are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. App. A) affirming a

report and order of the Interstate Commerce Commission (J.S. App. B). The Commission denied appellant authority to purchase the operating rights of England Transportation Company of Texas (England of Texas) and a portion of the operating rights of England Transportation Co., Inc. (England), under Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), and denied appellant's application to operate over specified regular routes between Houston, Texas, and New Orleans, Louisiana, serving intermediate points thereon, under Section 207 of the Interstate Commerce Act, 49 U.S.C. § 307.

On July 7, 1964, appellant filed its application to purchase the England of Texas rights and a portion of the England rights. By an order of September 30, 1964, the Commission granted appellant's application under Section 210a(b) of the Act, 49 U.S.C. § 310a(b), for temporary authority to lease the rights sought to be acquired from England and certain of the rights sought to be acquired from England of Texas. Temporary operations under such authority were commenced by appellant on October 28, 1964. On December 21, 1964, appellant filed its application to operate over regular routes in the same areas as a portion of the irregular-route operating rights it sought to purchase. Both applications were heard on a common record and were opposed by motor carrier appellees. On May 16, 1966, the hearing examiner recommended approval, with modifications, of the Section 5 purchase application and recommended the grant, with certain exceptions, of the Section 207 extension application (J.S. App. C).

On August 15, 1967, the Commission served its report and order in which it denied both applications, finding that the transaction proposed in the Section 5 application had not been shown to be consistent with the public interest and that the operations proposed in the Section 207 applications were not required by the public convenience and necessity (J.S. App. B). The Commission further found that a new and totally different service would occur with the England companies' operating rights in the hands of appellant, that both England and appellant had engaged in unlawful operations, that much of the traffic appellant would generate would be at the expense of existing carriers, and that the lack of need shown for an extension of appellant's authority, coupled with the questionable aspect of its fitness, impelled denial of the Section 207 application (J.S. App. B, 42-48).

Appellant filed a petition for reconsideration which the Commission denied by its order of March 4, 1969 (J.S. App. D).

Appellant instituted an action in the district court to set aside the Commission's report and orders (J.S. App. A, 1). The Court below found that the Commission's report rationally segregates and disposes of all issues raised in each proceeding and that the Commission's orders were based on substantial evidence and according to the applicable law (J.S. App. A, 5).

During the pendency of this litigation appellant has continued to conduct operations under temporary authority by virtue of (1) a temporary restraining order granted by the district court pending trial on the

merits and (2) a stay order issued by Mr. Justice Harlan pending this Court's action on the Jurisdictional Statement.

ARGUMENT

The judgment of the district court affirming the Commission's order is clearly correct for the reasons therein stated.

Appellant's jurisdictional statement presents three questions. The contention accorded principal emphasis is that the Commission did not consider relevant evidence to determine where the public interest lay. Such contention is without merit. The Commission considered, *inter alia*, that the England companies and appellant had engaged in unlawful operations (J.S. App. B, 40-42), that the England companies ". . . did not operate directly to other Texas points nor was the traffic which England (Tex.) interlined at Houston with other carriers a significant factor—certainly not when compared with the new and totally different service or the magnitude of use which would occur with the operating rights in the hands of Copperstate . . ." (J.S. App. B, 42), that appellant's shipper witnesses failed to show a need for any service that cannot be supplied by existing carriers (J.S. App. B, 47), and that much of the traffic appellant would generate would be at the expense of existing carriers (J.S. App. B, 47). Section 5(2) ". . . entrusts the Commission with the duty to decide what considerations . . . shall be given weight." *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 127, 83 S.Ct.

217, 225 (1962). *Cf. McLean Trucking Co. v. United States*, 321 U.S. 67, 64 S.Ct. 370 (1944). "The fitness of an applicant for authority to extend its operations under section 5 through the acquisition of additional motor-carrier operating rights is one of the most important questions involved in determining whether a proposed transaction would be consistent with the public interest." *Be-Mac Transport Co., Inc.—Purchase*—Nix, 87 M.C.C. 737, 741 (Div. 3, 1961). This Court recognized the relevance of prior unlawful operations to the issue of consistency with the public interest in *Gilbertville Trucking Co. v. United States, supra.* And the Commission has repeatedly found that the public interest requires disapproval in whole or in part of a proposed unification where new competitive service would result without a showing that such resulting new service would be responsive to a public need for adequate service not being met by existing carriers.* One of the most recent cases affirming the

*The following are representative of the Commission's consistent holdings requiring proof of public need in Section 5 cases to warrant either reactivation, transfer and unification or any other new competitive use of vendor's certificated rights. *Compare Crichton*, 35 M.C.C. 661, 664 (Div. 4, 1940) and *Quaker City*, 38 M.C.C. 603 (Full Com., 1942) *with Adkins*, 38 M.C.C. 240, 243 (Div. 4, 1942); *Falwell*, 40 M.C.C. 439 (Full Com., 1946), *affirmed, Falwell v. United States*, 69 F. Supp. 71 (W.D. Va., 1946), *aff'd per curiam*, 330 U.S. 807, 67 S.Ct. 1087 (1947); *La Mere*, 55 M.C.C. 501 (Div. 4, 1949); *Transcon*, 56 M.C.C. 521 (Full Com., 1950); *Shein*, 46 M.C.C. 711 (Div. 4, 1950), *affirmed, Shein v. United States*, 102 F.Supp. 320 (N.J., 1951), *aff'd per curiam*, 343 U.S. 944, 72 S.Ct. 1043 (1952); *Houff*, (not printed), *affirmed*,

Commission's observance of these criteria was cited by the district court. *Braswell Motor Freight Lines, Inc. v. United States*, 275 F.Supp. 98 (W.D. Tex., 1967), *aff'd per curiam*, 389 U.S. 569, *rehearing denied*, 390 U.S. 975 (1968).

Appellant's second contention is that the Commission arbitrarily segregated its discussion of the evidence in the assailed report. The court below appropriately disposed of this contention by holding that "[f]orm does not govern substance, and the Commission's findings in the § 207 proceedings are fully applicable to the same issues in the § 5 matters . . ." (J.S. App. A, 5). To argue that the Commission considered the section 5 case in some sort of isolated vacuum is clearly unwarranted when the Commission's report is examined.

Appellant's remaining contention is, in essence, that the Commission approved a transaction proposed in another section 5 application* involving prior unlawful activities only a few weeks before it denied appellant's applications and that this constitutes a "shocking disparity in treatment . . . ." But whether the Commission has given more or less weight to certain

---

Houff Transfer, Inc. v. United States, 105 F.Supp. 851 (W.D. Va., 1952); *Cooper*, 58 M.C.C. 283 (Full Com., 1952); *Ratner*, 70 M.C.C. 251 (Div. 4, 1956), *affirmed, Ratner v. United States*, 162 F.Supp. 518 (S.D. Ill., 1957), *aff'd per curiam*, 365 U.S. 368, 78 S.Ct. 913 (1958); *C & H Transportation Co. v. United States*, 249 F.Supp. 97 (N.D. Tex., 1965).

**Consolidated Freightways of Delaware—Control—Southern Plaza Express, Inc.*, 104 M.C.C. 194 (1967).

factors in one case than it has in another is not determinative of the validity of the Commission's action. *Virginian Ry. v. United States*, 272 U.S. 658, 665-666, 47 S.Ct. 225 (1926); *Whitehouse Trucking, Inc. v. United States*, 261 F.Supp. 9, 11 (N.D. Ohio, 1966), *aff'd per curiam*, 388 U.S. 453, 87 S.Ct. 2111 (1967); *Watkins Motor Lines, Inc. v. United States*, 243 F. Supp. 436, 443 n. 11 (D. Neb., 1965); *Ace Lines, Inc. v. United States*, 197 F.Supp. 591, 599 (S.D. Iowa, 1960). Instead, the test of review is that set forth in the decision of the Court below (J.S. App. A, 4-5).

CONCLUSION AND PRAYER

For the foregoing reasons appellees submit that this appeal presents no substantial question warranting oral submission and full consideration. Therefore, the judgment of the district court should be affirmed, and appellees so pray.

Respectfully submitted,

Phillip Robinson
Mert Starnes
JAMES, ROBINSON, FELTS & STARNES
The 904 Lavaca Building
Austin, Texas 78701

Attorneys for Appellees
Central Freight Lines Inc.
Red Ball Motor Freight, Inc
Saia Motor Freight Line, Inc.

PROOF OF SERVICE

I, Phillip Robinson, attorney for appellees Central Freight Lines Inc., Red Ball Motor Freight, Inc., and Saia Motor Freight Line, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2nd day of April, 1969, I served copies of the foregoing Motion to Affirm on the several parties to this action as follows:

1. On the United States, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D. C. 20530.

2. On the Interstate Commerce Commission, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to Hon. Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington, D. C. 20423; and to Hon. Nahum Litt, Attorney, Office of the General Counsel, Interstate Commerce Commission, Washington, D. C. 20423.

2. On the attorneys for appellant here, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to David Axelrod, Axelrod, Goodman & Steiner, 39 South LaSalle Street, Chicago, Illinois 60603; and Ball, Hunt, Hart & Brown, 120 Linden Avenue, Long Beach, California 90802.

4. On the attorneys for other appellees herein, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to M. Ward Bailey and

T. S. Christopher, Christopher & Bailey, 2412 Continental Life Building, Fort Worth, Texas 76102; Phineas Stevens, Suite 700, Petroleum Building, P. O. Box 1250, Jackson, Mississippi 39205; James Wrape and Robert E. Joyner, 2111 Sterick Building, Memphis, Tennessee 38103; Leroy Hallman, and William E. Livingstone, Phinney, Hallman, Pulley & Livingstone, 4555 First National Bank Building, Dallas, Texas 75202; Reagan Sayers and Clayte Binion, Rawlings, Sayers & Scurlock, P. O. Box 17007, Fort Worth, Texas 76102; Maurice E. Hibbert and Warren N. Grossman, Knapp, Gill, Hibbert & Stevens, 825 City National Bank Building, 606 South Olive Street, Los Angeles, California 90014; W. D. Beatenbough, Vice President-Traffic, Ryder Truck Lines, Inc., P. O. Box 2408, Jacksonville, Florida 32203; Charles L. Ford, Texas Railroad Association, P. O. Box 1767, Austin, Texas 78767; Rollo E. Kidwell, P. O. Box 10125, Dallas, Texas 75207; Charles D. Mathews, P. O. Box 47407, Dallas, Texas 75247; Hugh T. Matthews, Brooks, Montgomery & Matthews, 630 Fidelity Union Tower, Dallas, Texas 75201; Franklin H. Wilson, McCutchen, Black, Verleger & Shea, 615 South Flower Street, Los Angeles, California 90017; and Theodore W. Russell and Robert Y. Schureman, 1545 Wilshire Boulevard, Los Angeles, California 90017.

5. On the attorney for Strickland Transportation Transportation Company, intervening plaintiff below, by mailing copies thereof, in duly addressed envelopes,

with air mail postage prepaid, to Dennis G. Lyons, 1229 Nineteenth Street, N. W., Washington, D. C. 20036.

Phillip Robinson

PHILLIP ROBINSON

LIBRARY
SUPREME COURT, U. S.

FILED
APR 4 1969
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM 1968

No. 1128

CONSOLIDATED COPPERSTATE LINES, *Appellant,*

v.

THE UNITED STATES OF AMERICA, ET AL, *Appellees.*

No. 1141

STRICKLAND TRANSPORTATION CO., INC., *Appellant,*

v.

THE UNITED STATES OF AMERICA, ET AL, *Appellees.*

On Appeal from the United States District Court for the Central District of California

MOTION TO AFFIRM

CARL L. PHINNEY,
4555 First National Bank Bldg.,
Dallas, Texas 75202,

Counsel for Herrin Transportation Company, Appellee.

April, 1969

THE WARLICK PRESS DIVISION, STECK-WARLICK CO.
P. O. BOX 10543 — 1455 ROUND TABLE DRIVE — DALLAS — ME 1-3130

SUBJECT INDEX

	Page
Statement	2
Argument	7
Conclusion	14

Page

Cases

Acme Cartage Co. v. United States, 290 F. Supp. 453 (D.C. Wash. 1968) 13

Consolidated Freightways Corp. of Del. — Control — Southern Plaza Exp., Inc., 104 M.C.C. 194 13

Gilbertville Trucking Co., Inc. v. United States, 371 U.S. 115, 127 (1962) 7, 8, 13, 14

Interstate Commerce Commission v. Parker, 326 U.S. 60 (1945) 13

McLean Trucking Co. v. United States, 321 U.S. 67, 86-88 7

NLRB v. Mall Tool Co., 119 F. 2d 700, 702 (C.A. 7, 1941) 13

Schwabacher v. United States, 334 U.S. 182, 193 7

United States v. Pierce Auto Freight Lines, 327 U.S. 515 (1946) 14

Virginian R. Co. v. United States, 272 U.S. 658, 666 (1926) 13

Western Papermakers' Chemical Co. v. United States, 271 U.S. 268, 271 (1926) 13

Other Authorities

49 U.S.C. §5 ..... 3, 6, 12, 13

§5(2) 3

§5(2)(c) 8

§5(4) 8, 13

49 U.S.C. §307 (Interstate Commerce Act) 3

§307(a) 6

In the

Supreme Court of the United States

OCTOBER TERM 1968

No. 1128

CONSOLIDATED COPPERSTATE LINES,

Appellant,

v.

THE UNITED STATES OF AMERICA, ET AL,

Appellees.

No. 1141

STRICKLAND TRANSPORTATION CO., INC.,

Appellant,

v.

THE UNITED STATES OF AMERICA, ET AL,

Appellees.

On Appeal from the United States District Court for the Central District of California

---

MOTION TO AFFIRM

Pursuant to Rule 16.1.(c), THE SUPREME COURT OF THE UNITED STATES REVISED RULES (1967), Herrin Transportation Company, Appellee, moves that the judgment of the District Court be affirmed.

STATEMENT

Appellee, Herrin Transportation Company, is a party of record and has a justiciable interest in both Cause No. 1128, appeal of Consolidated Copperstate Lines (hereinafter referred to as Appellant Copperstate) and Cause No. 1141, appeal of Strickland Transportation Co., Inc. (hereinafter referred to as Appellant Strickland). Appellee Herrin Transportation Company consolidates its motion to affirm in Cause No. 1128 and Cause No. 1141 based on the previous procedure of handling of the cases by the Interstate Commerce Commission and the Federal District Court for the Central District of California. Citations to Appellant Copperstate's jurisdictional statement will be referenced (J.S.C.) and citations to Appellant Strickland's jurisdictional statement will be referenced (J.S.S.).

This case involves direct appeals from a final judgment (J.S.C. App. A 1-5; J.S.S. App. A 1a-5a) of a 3-Judge District Court affirming orders of the Interstate Commerce Commission (J.S.C. App. B 6-52; J.S.S. App. C 8a-40a) in an action brought by Appellants Copperstate and Strickland to set aside such orders.

The background of the case is adequately stated in the report of the Commission (J.S.C. App. B 7-9) and only brief excerpts will be restated in this motion for clarity. Appellant Copperstate filed a joint application with England Transportation Company, a Louisiana corporation, and England Transportation Company of Texas, a Texas corporation, seeking authority under §5 of the Interstate Com-

merce Act, 49 U.S.C. §5(2) for the purchase by Appellant Copperstate of certain operating rights and property of England (La.) and all of the operating rights of England (Tex.) for a total price of $400,000.00. The England (La.) and England (Tex.) authority sought to be acquired by Appellant Copperstate is set out in detail in the Commission's report (J.S.C. App. B 21; 12). In a matter alleged by Appellant Copperstate to be directly related Copperstate was applicant under a §207 proceeding of the Interstate Commerce Act, 49 U.S.C. 307, seeking to operate over regular routes, in the same area as a portion of the irregular route operating rights to be acquired. The territory covered by Appellant Copperstate's §207 application is set out in Appendix B to its jurisdictional statement at pages 21 and 22. To the extent Appellant Copperstate by its §207 application seeks authority westbound from Lake Charles, Louisiana, to Houston, Texas, it is one for new authority since England (Tex.) holds no like authority (J.S.C. App. B 22).

Appellant Strickland filed a joint application with England (La.) seeking authority under §5 of the Interstate Commerce Act, 49 U.S.C. §5(2), for the purchase by Appellant Strickland of certain operating rights of England (La.) for $495,000.00. A description of the authority sought to be purchased by Appellant Strickland is contained in the Commission's report (J.S.C. App. B 17). In a directly related matter, Appellant Strickland filed an application under §207 of the Interstate Commerce Act, 49 U.S.C. §307, seeking to convert a portion of the operating rights sought to be acquired from irregular route to regular route operations. A

description of the authority sought by Appellant Strickland in the §207 proceeding is contained in the Commission report (J.S.C. App. B 18-19).

The applications of Appellants Copperstate and Strickland were denied by the entire Commission (J.S.C. App. B 6-52). In support of its denial of the subject applications, the Commission found:

(1) Strickland conducted operations in an unlawful manner including unlawful interchange and unlawful cross-hauling; (J.S.C. App. B 34)

(2) Strickland did not discharge its burden of proving England (La.) as vendor performed substantial and lawful movements under the rights involved in the transaction; (J.S.C. App. B 34-35)

(3) Vendor England (La.) and vendee Appellant Strickland both conducted unlawful operations and conducted them not under color of right or under any honest belief that they were lawful and there was no overriding public need established for the proposed lawful future operations; (J.S.C. App. B 35)

(4) The testimony of shippers supporting the application of Appellant Strickland did not establish any public convenience and necessity such as to mitigate or excuse the unlawfulness of England (La.) and Appellant Strickland in their joint operations; (J.S.C. App. B 36)

(5) Conversion of a portion of England's irregular route rights to regular route would create an entirely new and different service which would clearly have an adverse effect on the existing competitive situation; (J.S.C. App. B 37)

(6) Appellant Strickland's §207 application was made directly related to and contingent upon approval of the §5 application and, therefore, must be denied; (J.S.C. App. B 37-38)

(7) In connection with the Appellant Copperstate, westbound operations from the Texas-Louisiana state line to Houston were conducted by England (Tex.) without authority and were unlawful; (J.S.C. App. B 41)

(8) The service performed by the England companies between Houston and New Orleans, whether lawfully or unlawfully, clearly established that when compared with the proposed utilization of said operating rights by Appellant Copperstate would result in a new and totally different service by vendee; (J.S.C. App. B 42)

(9) England (La.) has operated an unlawful cross-radial haul of New Orleans on traffic bound from Baton Rouge to Houston and Appellant Copperstate continued such unlawful movements thereby raising a serious question concerning the fitness of Appellant Copperstate; (J.S.C. App. B 42-43)

(10) With respect to the §207 application, lack of need shown for an extension of Appellant Copperstate's authority coupled with the questionable aspect of its fitness in conducting temporary operations impels denial of the application for new authority. Supporting shippers have not established a need for any service that cannot be supplied by existing carriers. (J.S.C. App. B 47-48)

In connection with the Court's consideration of the jurisdictional statements filed by Appellants Strickland and Copperstate, brief reference is necessary to focus attention on the chronological sequence of steps in this case. In October, 1964, the Commission granted temporary authority "pending the determination" by the Commission of the applications for Appellants Strickland and Copperstate to purchase the involved operating rights. Operations under such *temporary authority* were commenced in 1964 and have been continued until this date. The subject applications under 49 U.S.C. §5 to purchase such operating rights (finance applications) and under 49 U.S.C. §307(a) (extension applications) were heard on consolidated record by a hearing examiner of the Commission, protested by numerous motor carrier appellees and continued for many weeks. The examiner recommended the grant of the applications (J.S.C. App. C). After due consideration of the record and briefs of the parties, the *entire Commission* denied the applications (J.S.C. App. B). After petitions for reconsideration were denied Appellants appealed to the

United States District Court, Central District of California, which granted a temporary restraining order against the enforcement of such order of denial pending trial on the merits. Ultimately, the 3-Judge District Court on December 2, 1968, affirmed the Commission's denial in a unanimous opinion (J.S.C. App. A). On December 12, 1968, the Interstate Commerce Commission entered its order giving effect to the decision of the Court and making the effective date of its prior denial February 10, 1969. Appellants sought a stay from the 3-Judge Court pending appeal to this Court which was denied on January 27, 1969. On February 4, 1969, Mr. Justice Harlan issued his memorandum and order staying the order of the Commission of December 12, 1968, pending this Court's action on the jurisdictional statements.

ARGUMENT

The decision below is correct and it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

1. The controlling principle in the instant proceeding is the one well established by the Interstate Commerce Commission and this Supreme Court as stated in *Gilbertville Trucking Co., Inc. v. United States*, 371 U.S. 115, 127. See also *McLean Trucking Co. v. United States*, 321 U.S. 67, 86-88; *Schwabacher v. United States*, 334 U.S. 182, 193. In the *Gilbertville* case, the applicants argued before the Supreme Court that the Commission had denied the §5 application automatically upon determining that a violation of

§5(4) existed without giving consideration to approval notwithstanding the violation if the application was consistent with the public interest. Chief Justice Warren in speaking for the Court and rejecting applicants' arguments stated:

> The statute entrusts the Commission with the duty to decide what considerations other than those specifically mentioned in §5(2)(c) shall be given weight.

This Court went on to recognize that the Commission had chosen to give weight to the applicants' fitness and that integral to a determination of fitness is the applicant's willingness and ability to fulfill its obligations to the Commission, considerations which could be demonstrated by past or continued violation of Commission regulations. The applicants were vigorous in their argument before this Court in the *Gilbertville* case that in spite of the §5(4) violation they had a right to have the applications considered and approved and charged the Commission had raised the §5(4) violation as an automatic bar to approval of the subsequent merger. In the *Gilbertville* case it might be noted the trial examiner actually found that the violation was neither willful, flagrant nor the result of persistent disregard for regulations. This Court, notwithstanding the vigorous argument of applicants, found that even though a rule may be automatic it is not necessarily arbitrary. This Court concluded that the Commission's rule is not automatic and will give way to a clear showing of public interest but found the appellants before the Bar in the *Gilbertville* case had failed to make such a clear showing of public interest. The order denying the merger was affirmed. Appel-

lants Strickland and Copperstate are faced with the additional fact that the Commission, upon due consideration of the entire history surrounding the subject certificates, found the existence of an element of willfulness in the unlawful operations conducted by the England Companies and the Appellants.

The Commission is the expert in this field and it has carefully considered the actions of the England Companies, Appellant Strickland and Appellant Copperstate. The proper statutory criteria have been applied and Appellants have been found wanting in several material respects. Appellants seek to emphasize the gravity of their loss if the Commission's order stands. Appellee Herrin recognizes the importance of this case to Appellants Strickland and Copperstate. The case is equally important to the course of orderly administration of the Interstate Commerce Act, as well as the competitive position of Appellee Herrin and other participating carriers. Appellants' cause, as the Commission and Federal District Court recognized, cannot be bolstered by unlawful operations conducted over a long period of time under temporary authority pending consideration and final determination of this case by the Commission and their manifest failure to discharge their burden under established criteria for judging cases of this nature.

2. Appellant Strickland contends that one question presented to this Court is whether or not the Commission erred in holding that the equipment interchange conducted by England (La.) — Strickland between Shreveport and New

Orleans was unlawful. This is not a substantial question which requires consideration by this Court. The Court can readily see from studying the Commission's order (J.S.S. App. C 25a-28a) that the Commission gave full and adequate consideration to the facts of record concerning the Shreveport-New Orleans interchange operations of Appellant Strickland and England (La.). The simple fact is the unlawful operations were conducted, the Commission has so concluded, and the determination has been made by the Commission that sufficient evidence of an overriding public need does not exist in the record. Admittedly, Appellant Strickland does not agree with the Commission and lower Court's determination but mere difference of opinion concerning importance and construction to be given facts existing between Appellant Strickland, on the one hand, and the Interstate Commerce Commission and the lower Federal District Court, on the other, does not present a substantial question for consideration by this Court.

3. Appellant Strickland also complains of the failure of the Commission to approve the purchase by Strickland of England's Monroe-New Orleans operating rights. Its rationale is difficult to understand but, apparently, the contention is that the hearing examiner took it upon himself to recommend the conversion of the irregular authority for which Strickland had applied to regular authority and Appellant Strickland suffered some injury by this recommended conversion since the Commission allegedly considered this part of the case *only* on the basis recommended by the examiner. The Commission's report (J.S.S. App. C 29a-30a)

points out the fallacy of Appellant Strickland's contention. Appellant Strickland would have this Court believe that if the examiner had not taken it upon himself to recommend a conversion of certain irregular route authority to regular route authority, the Commission would have clearly been compelled to approve this portion of the application. This is not the fact. The facts establish the examiner was faced with an impossible situation concerning the proposed transfer of these irregular route rights since the operations conducted thereunder were unlawful and bore no similarity to the nature of the underlying certificate issued by the Interstate Commerce Commission. To solve the impasse, the examiner came up with the "ingenious" solution about which Appellant Strickland now complains before this Court. A cursory reading of the Commission's detailed discussion of this matter establishes that under neither set of circumstances would approval be warranted.

4. Appellant Strickland, lastly, asserts the rather standard argument that it was not afforded procedural due process and that the case was actually decided on the basis of issues not raised by the parties or before the Commission. This argument of Appellant Strickland is, in the opinion of Appellee Herrin Transportation Company, more illusory than real since the principal basis on which this case was decided by the Commission was the conduct of unlawful operations by the parties to the applications before the Commission and the complete failure of the applicants to discharge their burden with respect to established criteria, including failure to establish public convenience and neces-

sity or an overriding public need requiring the granting of the applications in the face of the unlawful operations and apparently willful violations of established Commission rules and regulations. These issues were clearly indicated from the inception of this case.

5. Appellant Copperstate complains (J.S.C. App. A 9-12) that the Commission compartmentalized and segregated the evidence in the §5 finance application from the evidence in the §207 extension of operating rights application and did not consider the operations of Appellant Copperstate under temporary authority nor consider all of the evidence in the record as a whole in the disposition of both applications. This argument will not stand the test of due reflection and a complete reading of the Commission's report in context establishes the contrary. The Court below has correctly stated the facts with respect to this contention made by Appellant Copperstate (J.S.C. App. A 5). The Commission considered the applications in one report and order and "did not separate item by item the findings in regard to each application." The Court went on to find that form does not govern substance and the Commission's findings in the §207 proceeding are fully applicable to the same issues in the §5 matters. The Commission, in fact, first considered all of the evidence in both applications, the illegality of Appellants' operations and the concept of new and differing service under the involved operating rights as bearing on the statutory concept of public interest (J.S.C. App. B 41-43). Appellant Copperstate's objection to the form of the report is without substantial merit and should not form the basis

for review by this Court. *Interstate Commerce Commission v. Parker*, 326 U.S. 60 (1945); *Gilbertville Trucking Co. v. United States*, 371 U.S. 115 (1962).

6. Appellant Copperstate finally complains (J.S.C. 12-15) that the Commission adopted standards in the determination of its applications differing from those in *Consolidated Freightways Corp. of Del. — Control — Southern Plaza Exp., Inc.*, 104 M.C.C. 194. It contends this departure results in arbitrary and capricious action and cites *Acme Cartage Co. v. United States*, 290 F. Supp. 453 (D.C. Wash. 1968) and *NLRB v. Mall Tool Co.*, 119 F. 2d 700, 702 (C.A. 7, 1941). The *Acme* case concerned unpredictable enforcement of *rules* in which no discretion was involved and, therefore, is not relevant to a determination of this case. This argument by Appellant Copperstate is rebutted by such cases as *Virginian R. Co. v. United States*, 272 U.S. 658, 666 (1926) and *Western Papermakers' Chemical Co. v. United States*, 271 U.S. 268, 271 (1926). Those cases stand for the well-established proposition of this Court that doctrines of res judicata or stare decisis do not apply to decisions of the Interstate Commerce Commission and this Court will not concern itself with the alleged inconsistency by the Commission in deciding two cases involving different parties, facts and circumstances. In the *Freightways* case, the Commission actually found there was a technical violation of §5(4) because Freightways already had the power to control Southern Plaza and that it would retain that power even if the §5 application were denied. The Commission went on to determine it should give approval to the trans-

action because of the significant public interest factor existing in the circumstances. No such circumstances exist in the present proceeding and the applicable principle properly utilized by the Commission is the one previously referred to herein and contained in the *Gilbertville* case.

7. Appellants Strickland and Copperstate have found areas of disagreement and dissatisfaction with the decision of the Commission and the Court below. Appellee, Herrin Transportation Company is firm in its belief that the Commission has acted in a proper exercise of discretion allowed by this Court under decisions such as *United States v. Pierce Auto Freight Lines*, 327 U.S. 515 (1946).

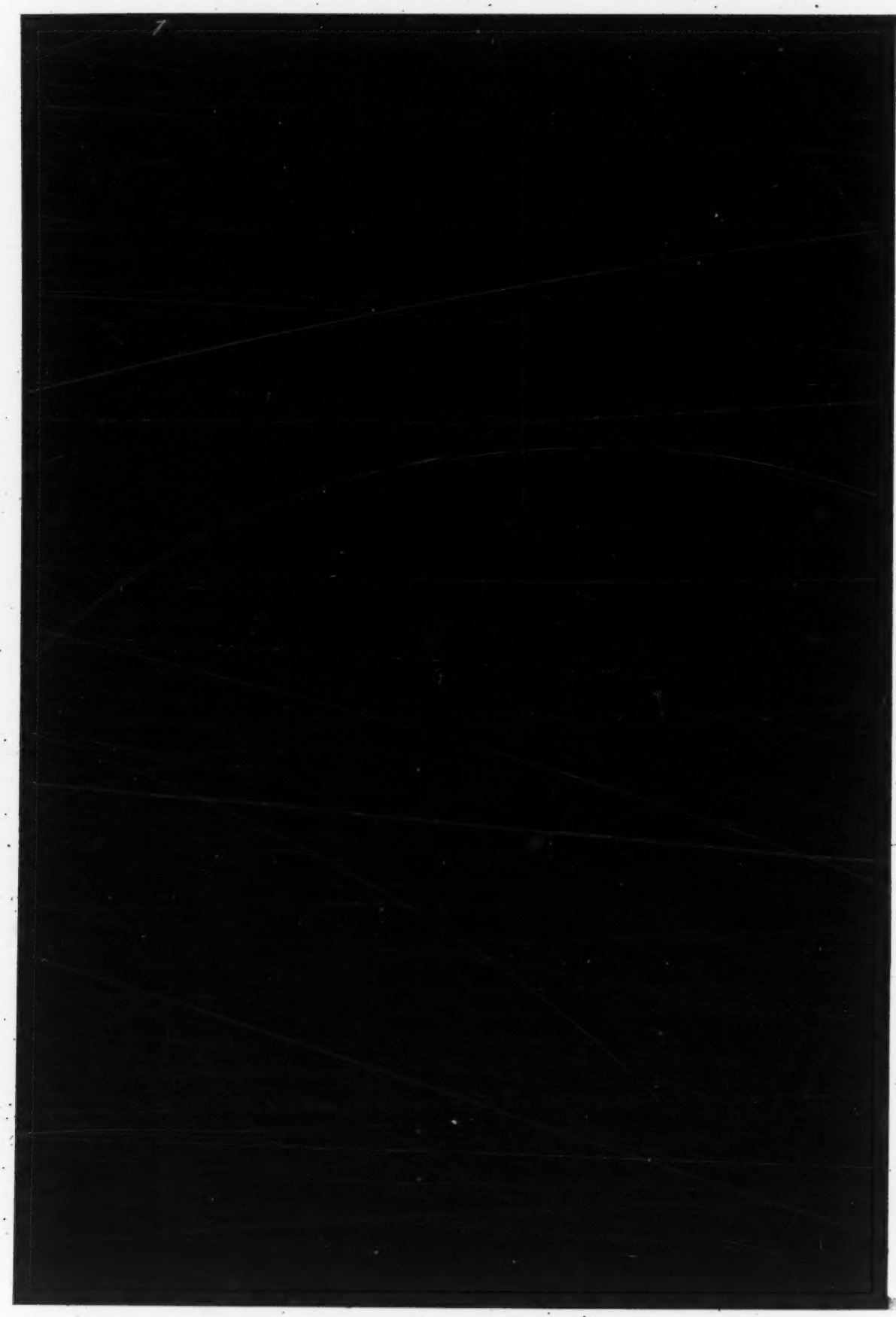
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

CARL L. PHINNEY,
4555 First National Bank Bldg.,
Dallas, Texas 75202, 741-6263,
Counsel for Herrin Transportation Company, Appellee.

Wm. E. Livingstone, III and
Phinney, Hallman, Pulley & Livingstone
4555 First National Bank Building
Dallas, Texas 75202, 741-6263
Of Counsel

DATED: April, 1969



INDEX

	Page
Statement	1
Argument	4
A. Strickland's appeal—No. 1141	5
B. Copperstate's appeal—No. 1128	9
Conclusion	11

CITATIONS

Cases:

Bowles v. *Seminole Rock Co.*, 325 U.S. 410	
Braswell Motor Freight Lines, Inc. v. *United States*, 275 F. Supp. 98, aff'd *per curiam*, 389 U.S. 569	4
C&H Transp. Co. v. *United States*, 249 F. Supp. 97	4
Campbell Sixty-Six Exp., Inc., 81 M.C.C. 53	8
Consolidated Freightways Corp. of Delaware—Control, 104 M.C.C. 194	10
Dealers Transit Inc.—Control, 93 M.C.C. 611	8
Gordon's Transports, Inc. v. *Strickland Transportation*, 318 I.C.C. 395, sustained *sub nom. Strickland Transportation Co.* v. *United States*, 219 F. Supp. 618	5
Great Coastal Express, Inc. v. *United States*, 243 F. Supp. 943, aff'd *per curiam*, 382 U.S. 369	4
Houff Transfer, Inc. v. *United States*, 291 F. Supp. 831	4
Interstate Investors, Inc. v. *United States*, 287 F. Supp. 374, aff'd *per curiam*, 393 U.S. 479	10

Cases—Continued

	Page
Knetsch v. *United States*, 364 U.S. 361	7
Shein v. *United States*, 102 F. Supp. 320, aff'd *per curiam*, 343 U.S. 944	4
Stewart—Investigation of Control, 87 M.C.C. 681	8
Tank Lines, Inc.—Purchase, 90 M.C.C. 381, sustained *sub nom. Tank Lines, Inc.* v. *United States*, 236 F. Supp. 354	7
Virginian Ry. Co. v. *United States*, 272 U.S. 658	11

Statutes and Regulations:

Interstate Commerce Act:	
Section 5 (49 U.S.C. 5)	2, 4
Section 207 (49 U.S.C. 307)	2, 9
49 C.F.R. 1057.5(a)	8
49 C.F.R. 1057.5(c)	6

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1128.

CONSOLIDATED COPPERSTATE LINES, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

No. 1141

STRICKLAND TRANSPORTATION COMPANY, INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

These are direct appeals from the judgment of a three-judge district court (J.S. App. A; 293 F. Supp.

858)[1] which dismissed complaints seeking to set aside certain orders of the Interstate Commerce Commission (J.S. App. B, D).[2] The Commission denied appellants' separate applications under section 5 of the Interstate Commerce Act (49 U.S.C. 5) for permission to purchase certain operating rights of the England Transportation Companies (England), as well as their related applications under section 207 of the Act (49 U.S.C. 307).

Appellant Consolidated Copperstate Lines (Copperstate) is a carrier in western and southwestern states, with its present eastern terminus at Houston, Texas. It sought England's authority to operate eastbound from Houston to New Orleans and westbound from New Orleans to Lake Charles, Louisiana. Additionally, Copperstate filed an application under Section 207 for authority duplicating England's authority and also for authority to operate from Lake Charles to Houston (which England did not have). By these applications Copperstate would extend its routes eastward to New Orleans.

Appellant Strickland Transportation Co., Inc. (Strickland), has authority to serve New Orleans from north central and northeastern points, but is required to do so circuitously, via points in Texas. It sought England's authority to operate between Louisiana points, including Shreveport, Monroe and New Orleans. Since Strickland has authority to serve Shreve-

[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement filed in No. 1128.

[2] A stay of judgment was granted on February 4, 1969, by Mr. Justice Harlan, conditioned upon the filing of jurisdictional statements by March 10, 1969.

port and Monroe directly from the north, the purchase would complete a relatively direct route to New Orleans, eliminating the need to detour through Texas.

The various applications, opposed by many competing motor carriers, were consolidated for all purposes. After lengthy hearings,[3] the examiner recommended conditional grants, but the Commission denied the applications upon consideration of exceptions and replies. The grounds of the Commission's denial were accurately summarized by the lower court (J.S. App. A, 3):

> * * * the Commission, upon substantial evidence, found (1) that both Copperstate and Strickland were relying on past operations unlawfully performed by the England Companies in violation of the terms of their certificates, (2) that to the extent such past operations had been unlawfully performed, they would not be considered as probative of the public interest, (3) that both Copperstate and Strickland, as well as the England Companies, had performed so-called cross-hauling in violation of their certificates, (4) that Strickland had unlawfully managed and controlled certain rights of England (La.) prior to the Commission's approval of the temporary lease arrangement, (5) that both purchase proposals were so different from that service lawfully rendered as to constitute a new service for which the public convenience and necessity must be proved, (6) that neither carrier had borne its burden of proof in showing a need for the new services, and (7) that

[3] The hearings involved over 4,000 pages of transcript and over 200 exhibits.

neither Strickland nor Copperstate was entitled to any special consideration under the doctrine of color-of-right or because of an overriding public interest.

Petitions for reconsideration and to reopen the proceedings for the receipt of additional evidence were subsequently denied by the Commission (J.S. App. D).

On review, the district court sustained the Commission's orders, holding that they were based on adequate findings of fact and supported by substantial evidence (J.S. App. A).

ARGUMENT

These cases involve the application of familiar rules to particular fact situations. A motor common carrier seeking to purchase the franchise of another has long been required to show, under Section 5 of the Act (49 U.S.C. 5), that the franchise is not dormant and that no materially new service will result from the acquisition. If revived or new operations are contemplated, the purchaser must prove that the public convenience and necessity require them. These principles are well settled.[4] Their application to the particular facts of these cases was unanimously approved by the court below and raises no substantial question.

---

[4] *E.g.*, *Braswell Motor Freight Lines, Inc.* v. *United States*, 275 F. Supp. 98 (W.D. Tex.), aff'd *per curiam*, 389 U.S. 569; *Great Coastal Express, Inc.* v. *United States*, 243 F. Supp. 943 (E.D. Va.), aff'd *per curiam*, 382 U.S. 369; *Shein* v. *United States*, 102 F. Supp. 320 (D.N.J.), affirmed *per curiam*, 343 U.S. 944; *C & H Transp. Co.* v. *United States*, 249 F. Supp. 97 (N.D. Tex.); *Houff Transfer, Inc.* v. *United States*, 291 F. Supp. 831 (W.D. Va.).

A. STRICKLAND'S APPEAL (NO. 1141)

The applications involved in this case represent the most recent of Strickland's continuing efforts to procure direct access to New Orleans from the north. These efforts began with a proposed purchase of England in 1958, which the Commission refused to approve, 85 M.C.C. 549, because it "would create a new competitive service * * * for which no need had been shown" (J.S. App. 10). Strickland then sought the same end by an arrangement with a railroad for "piggyback" shipment of its trailers into New Orleans by flatcar; this contract was found unlawful. *Gordon's Transports, Inc.* v. *Strickland Transportation,* 318 I.C.C. 395 (1962), sustained *sub nom. Strickland Transportation Co.* v. *United States,* 219 F. Supp. 618 (N.D. Tex.).[5] The next step was an "interchange" agreement between Strickland and England, which was in effect until the Commission approved a temporary lease arrangement pending its decision in the instant proceeding. Finally, by its applications in this proceeding, Strickland sought access from the north via two Louisiana cities England had served: (1) Shreveport, where the purported interchange had operated, and (2) Monroe, where England offered delivery service to and from New Orleans.

1. *Shreveport-New Orleans*—Strickland contends that the Commission improperly treated England's Shreveport-New Orleans rights as constructively dor-

[5] Neither the Commission nor the lower court passed on the *present* validity of any Strickland operations conducted via rail "piggyback." In any event "piggyback" rules are not decisive as to the all-motor operations now in question.

mant, thus requiring Strickland to demonstrate public need. The basis for the Commission's treatment was that England had exercised these rights almost exclusively for the "interchange" arrangement with Strickland, which it found to have been, in effect, an unlawful assumption of the rights by Strickland (J.S. App. 32–35).

The purported interchange had operated as follows: At both Shreveport (where Strickland's trucks would otherwise have had to detour through Texas) and New Orleans, shipments which began and ended on Strickland waybills would be brought to England for transportation to the other city. At the other city, England would return the shipments to Strickland for further shipment or delivery, even in England's own delivery area of New Orleans (J.S. App. 32). Since the shipments were delivered to and then retrieved from England in loaded and sealed trailers (J.S. App. 17), the service England provided was in no respect different from that which Strickland had previously sought to arrange unlawfully with the railroad; it simply bridged the gap in Strickland's authority, which the Commission had previously found "no need" to bridge. Indeed, all damage claims were paid by Strickland, contrary to the general practice as to "concealed damage" followed by carriers participating in bona fide "through movements" (Tr. 131, 167); England received only a flat fee per trailer hauled, regardless of weight or the nature of the goods carried, and in violation of the Commission's regulations requiring segregation of equipment and freight charges in interchange cases (49 C.F.R. 1057.5(c); J.S. App. 33–44). Virtually all the trailers thus moved belonged

to Strickland—59 of 60 in a sampled week (Tr. 185, 520); and during a period when Strickland moved over thirteen thousand tons through the so-called interchange, England moved only thirty-nine tons of its own freight, little more than two truck loads (Ex. 12–23) and 0.3 percent of the total haulage.

The Commission concluded that the service amounted to "operations by Strickland without possession of a certificate" (J.S. App. 34). The conclusion that the interchange was thus not valid, and that therefore England's rights were constructively dormant, is basically factual, adequately supported by the record as outlined above. The agency's construction of its own regulation involves no substantial question (*Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 414), especially since it involves mechanics and financing of trailer "interchange" arrangements, a subject within the Commission's informed discretion.

Even assuming that the arrangement might have complied with the technicalities of the Commission's "interchange" rules, this would hardly establish its legality as a device whereby Strickland could evade the limitations on its own certificates by acquiring another carrier's rights. Ostensible compliance with technical requirements does not preclude a finding of illegality. *Knetsch* v. *United States*, 364 U.S. 361. Thus, the Commission has consistently held, as here, that technical compliance with "lease and interchange" rules cannot be used as a device to create non-existent operating authority. *Tank Lines, Inc.—Purchase*, 90 M.C.C. 381, 384 (1962), sustained *sub nom. Tank Lines, Inc.* v. *United States*, 236 F. Supp. 354 (E.D. Va.

1964); *Stewart—Investigation of Control,* 87 M.C.C. 681, 696; *Campbell Sixty-Six Exp., Inc.,* 81 M.C.C. 53, 56; *Dealers Transit, Inc.—Control and Merger,* 93 M.C.C. 611, 619.[6]

2. *Monroe-New Orleans.*—Strickland also sought access to New Orleans via Monroe, Louisiana, which would have made possible routes from the north even shorter than those via Shreveport. In this regard, it sought to purchase the rights England had used to operate between Monroe and New Orleans. But, as the Commission found, England had used this authority on a strictly local basis between the two cities and intermediate points, as "strictly a distribution service" or a "simple peddle service" (J.S. App. 36–37). Strickland, on the other hand, contemplated the New Orleans-Monroe route as a leg of direct, single-line service between Chicago and New Orleans (J.S. App. 36). Thus, the Commission found, Strickland meant to put England's authority to a "vastly different" use—the same use for which the Commission had found there was "no need" (J.S. App. 37). Strickland's argument that the Commission never focused on its

[6] The Commission properly ruled that Strickland's belated submission of the agreement underlying the "interchange" did not require further hearings or reconsideration (J.S. App. 238–240). With or without a written document, the Commission's analysis of the underlying arrangement revealed it to be a subterfuge whereby Strickland acquired England's rights, using them as its own. Moreover the agreement should have been introduced during the hearings, where the legality of the "interchange" was at issue from the outset. Finally the agreement on its face violates the applicable regulation, 49 C.F.R. 1057.5(a) which requires that the document specifically describe vehicles, points of interchange, and the consideration—all absent here. (Strickland J.S. 53a–56a).

application, as distinguished from the examiner's recommendations (J.S., No. 1141, 35–36), is not well taken. The basic proposal was clearly considered and rejected when the Commission ruled that "[a]s we found in the *prior Strickland-England* case, the acquisition of England's irregular route rights by Strickland and conversion to a link in its long-line regular routes would be of little public benefit and would be certain to harm the operations of existing carriers." (J.S. App. 37).

B. COPPERSTATE'S APPEAL (NO. 1128)

Copperstate, simultaneously with its purchase application, filed an application for permission to extend its routes under Section 207 of the Act (49 U.S.C. 307), thus duplicating the authority it sought to buy from England and adding Lake Charles-to-Houston authority which England had lacked. The purchase was rejected because it envisioned a new pattern of transportation which could not be approved absent a showing of need (J.S. App. 43), but this ruling is not in issue on this appeal. The concomitant Section 207 application was also denied for failure of the carrier to prove need (J.S. App. 48). The gist of Copperstate's appeal is an allegation that the Commission failed to consider adequately the question of need in connection with the purchase application. (J.S. 7, 10–12).

Having determined the question of need in the Section 207 case, the Commission was plainly not obligated to repeat the same analysis in the context of

the purchase case. The witnesses' evidence,[7] transportation contemplated, and standard of "need" were the same in both cases. The agency was not required to cover the same ground twice. See *Interstate Investors, Inc.* v. *United States,* 287 F. Supp. 374, 390 (S.D. N.Y.), aff'd *per curiam,* 393 U.S. 479. As the lower court stated:

> * * * Form does not govern substance and the Commission's findings in the § 207 proceedings are fully applicable to the same issues in the § 5 matters. A study of the Commission's report requires the conclusion that its discretion rationally segregates and disposes of all issues raised in each proceeding. [J.S. App. 5].

There is no inconsistency between this case and *Consolidated Freightways Corp. of Delawdre—Control,* 104 M.C.C. 194, which held that whether a new service would be created through purchase should be determined on the facts of each case (104 M.C.C. at 217). Additionally, whether evidence of prior unlawful activity should be accorded more or less weight in a particular case is for the Commission to determine on the facts and poses no question for further review.[8]

---

[7] There is no merit to the claim that the Commission analyzed only 90 Copperstate witnesses (J.S. 7, 11). Though the agency mentioned 90 witnesses (J.S. App. 44), the immediately following discussion of groups of 15, 56, 7, 12 and 51 witnesses (J.S. App. 45–47) shows that all the evidence was considered. Similarly, operations under temporary authority, allegedly ignored in the 207 case (J.S. 11), were in fact considered, albeit adversely to Copperstate (J.S. App. 47, 48).

[8] *Consolidated* involved illegal activities of predecessors which did not benefit the purchaser (104 M.C.C. at 208, 210). Here substantial illegality was attributable to Copperstate itself, whose conduct was described by the Commission as evincing "* * * willful and defiant disregard for regulation * * *." (J. S. App. 42).

In any event an agency's alleged inconsistency is not in itself adequate reason for plenary consideration by this Court. *Virginian Ry. Co.* v. *United States,* 272 U.S. 658, 665–666.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD W. MCLAREN,
Assistant Attorney General.
GREGORY B. HOVENDON,
SEYMOUR H. DUSSMAN,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
NAHUM LITT,
JEROME NELSON,
Attorneys,
Interstate Commerce Commission.

APRIL 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 2 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1141

STRICKLAND TRANSPORTATION COMPANY, INC., *Appellant*

vs.

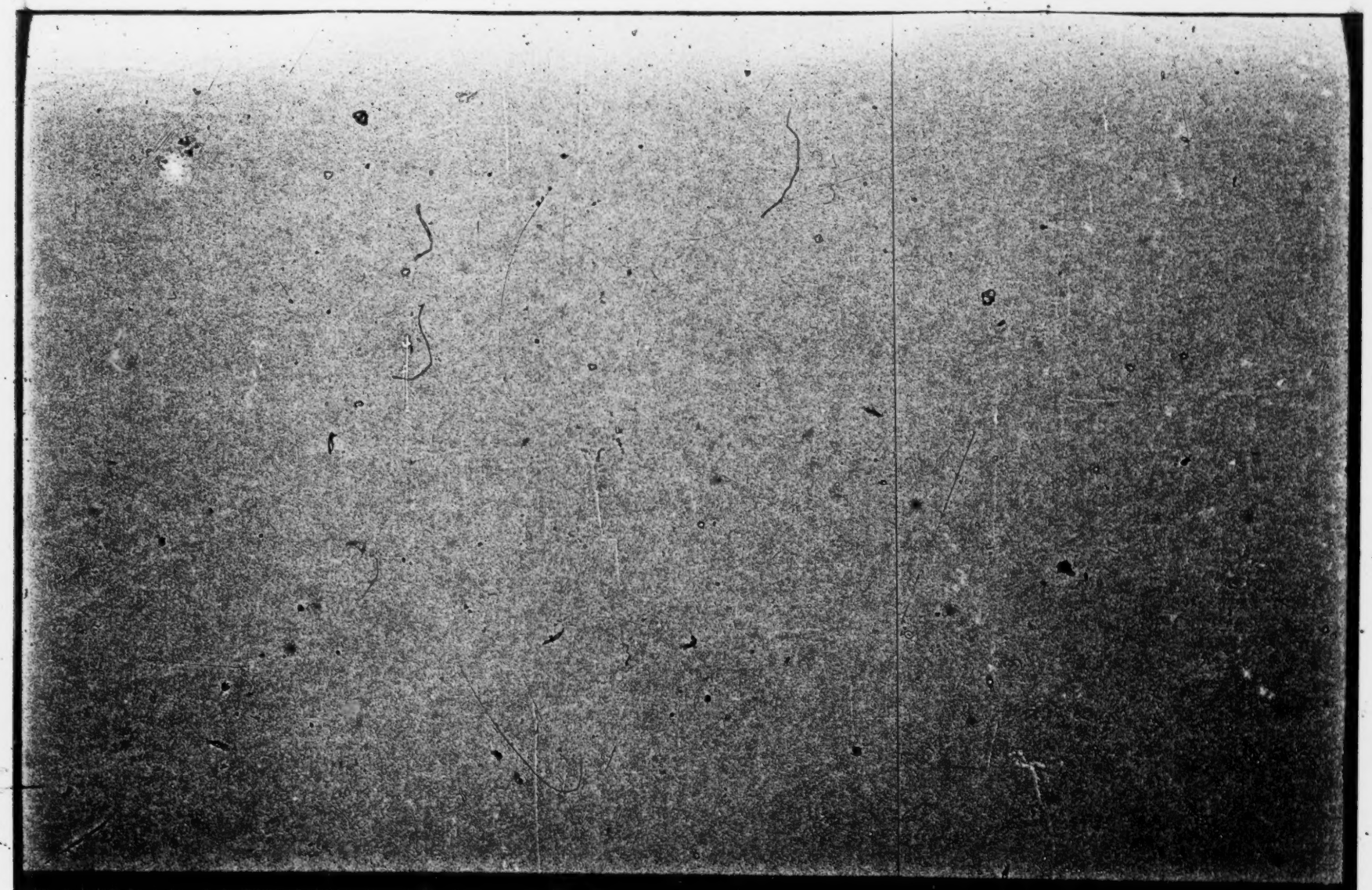
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CONSOLIDATED COPPER-STATE LINES, ARKANSAS-BEST FREIGHT SYSTEM, INC., GORDONS TRANSPORTS, INC., BRASWELL MOTOR FREIGHT LINES, INC., CENTRAL FREIGHT LINES, INC., RED BALL MOTOR FREIGHT, INC., SAIA MOTOR FREIGHT LINES, INC., HERRIN TRANSPORTATION CO., and RYDER TRUCK LINES, INC., *Appellees*

On Appeal From The United States District Court For The Central District of California

Motion To Affirm

MAURICE E. HIBBERT
WARREN N. GROSSMAN
KNAPP, GILL, HIBBERT & STEVENS
825 City National Bank Building
606 South Olive Street
Los Angeles, California 90014
LAWRENCE A. WINKLE
BRASWELL MOTOR FREIGHT LINES, INC.
Post Office Box 3989
Dallas, Texas 75208
M. WARD BAILEY
T. S. CHRISTOPHER
CHRISTOPHER AND BAILEY
2412 Continental Life Building
Fort Worth, Texas 76102
Attorney for Appellee, Braswell Motor Freight Lines, Inc.

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone ED 2-4070



INDEX

Page

MOTION TO AFFIRM 1

STATEMENT OF THE CASE 2

AUTHORITIES AND ARGUMENT 6

CERTIFICATE OF SERVICE 13

INDEX OF AUTHORITIES

Page

49 U.S.C. 307, Section 307 ..... 8, 9

ABC Freight Forwarding Cor. vs. United States, 125 Fed.Supp. 926, 929, 348 U.S. 967 10

Jacob Siegel vs. Federal Trade Commission, 327 U.S. 608, 611-612 11

Interstate Commerce Commission vs. Union Pacific R. Co., 222 U.S. 541 7

McLean Trucking Co. vs. United States, 321 U.S. 67, 87 6

Mississippi Valley Barge Line Co. vs. United States, 292 U.S. 282 7

Rochester Telephone Co. vs. U. S., 307 U.S. 125 7

U. S. vs. Pierce Auto Freight Lines, 327 U.S. 515 7

Virginian R. Co. vs. United States, 272 U.S. 658, 71 L.Ed. 463, 469 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1141

STRICKLAND TRANSPORTATION COMPANY, INC., *Appellant*

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CONSOLIDATED COPPER-STATE LINES, ARKANSAS-BEST FREIGHT SYSTEM, INC., GORDONS TRANSPORTS, INC., BRASWELL MOTOR FREIGHT LINES, INC., CENTRAL FREIGHT LINES, INC., RED BALL MOTOR FREIGHT, INC., SAIA MOTOR FREIGHT LINES, INC., HERRIN TRANSPORTATION CO., and RYDER TRUCK LINES, INC., *Appellees*

On Appeal From The United States District Court For The Central District of California

Motion To Affirm

Pursuant to Rule 16.1(c) of the Rules of this Court, intervening defendant, Braswell Motor Freight Lines, Inc., appellee herein, hereafter called appellee or Braswell, moves to affirm the judgment of the United States District Court, Central District of California[1], a statutory court of three Judges[2], affirming the deci-

[1]Not yet reported but copy attached to Appellant's Jurisdictional Statement as Appendix A. Copy of said Court's order denying appellant's motion to amend findings and make new findings is attached to appellant's Jurisdictional Statement as Appendix B.

[2]An action under 28 U.S.C. 1336, 1398, 2284, 2321-2325.

sion of the Interstate Commerce Commission[3], and as grounds for such motion says:

THAT IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

STATEMENT OF THE CASE

This is a direct appeal from a final judgment (see appellant's Appendices A and B) of a statutory court of three judges affirming the report and order of the Interstate Commerce Commission (see appellant's Appendix C — 104 M.C.C. 297).

Appellant had been accorded a full, complete and fair hearing before the Commission extending over many weeks, hearing more than 150 witnesses, receiving 229 exhibits, and compiling a record of more than 4,000 pages of transcript. At every step of the way all parties filed briefs with argument, and petitions for reconsideration with briefs and argument, until exhaustion of all administrative remedies.

The statement of the case by the Court below is complete and comprehensive as follows:

"Primarily involved are the purchases of operating rights of two companies, England Transportation Company, a Louisiana corporation, and England Transportation Company of Texas, a Texas corporation. These two companies ceased operations in 1964

[3]Reported at 104 M.C.C. 297.

due to failure to consummate a new labor agreement, and they placed their operating authority and equipment for sale at public auction. The plaintiffs, Consolidated Copperstate Lines and Strickland Transportation Co., Inc., were two successful bidders.

"The statutes involved are §§5(2) (a)(i), 5(2)(b), 207 and 210a(b) of the Interstate Commerce Act [49 U.S.C. §§5(2)(a)(i), 5(2)(b), 307 310a(b)].

"Section 5(2)(a) provides the basic permissibility for carriers to acquire control of other carriers.

"Section 5(2)(b) sets forth procedures and standards for Commission approval of such transactions.

"Section 207 provides for the grant of a certificate authorizing common carrier operation upon suitable findings of the public convenience and necessity.

"Section 210a(b) provides for the issuance of temporary authority for one motor carrier to operate or lease the rights of another carrier.

"In its §5 purchase application, Copperstate sought to obtain through the purchase of a portion of the rights of England Transportation Company of Louisiana (England, La.), and England Transportation Company of Texas (England, Tex.), more direct routes from its western and southwestern service territory to points in Texas and to penetrate the New Orleans, Louisiana, service territory by providing service between New Orleans and Houston, Texas. Copperstate also filed an application for authority under §207 for an extension of the rights it sought to acquire.

"By its §5 purchase application, Strickland[4] sought to obtain through the purchase of England (La.) a competitive, direct north-south route between its present east and northern service territory, on the one hand, and, on the other, New Orleans — from Texarkana, Texas, through Shreveport, Louisiana. Also, in a §207 application, Strickland sought to convert a portion of the England (La.) rights from irregular-route authority to regular-route authority.

"Temporary authority to operate the rights of the England Companies was granted by the Commission in September 1964 and both Strickland and Copperstate commenced operation the following month.

"Both Copperstate and Strickland sought approval before the Commission and were given temporary authority to operate under the England rights pending final order of the Commission. The hearing examiner recommended, generally, approval of the applications, but the Commission, with four dissenters, denied the applications. In reversing the examiner's recommendation, the Commission, upon substantial evidence, found (1) that both Copperstate and Strickland were relying on past operations unlawfully performed by the England Companies in violation of the terms of their certificates, (2) that to the extent such past operations had been unlawfully performed, they would not be considered as probative of the public interest, (3) that both Copperstate and Strickland,

[4]Consolidated Copperstate Lines' appeal to this Court is pending under this Court's Docket No. 1128. They are companion cases decided by the Commission in one report and order and determined by the District Court, Central District of California (a statutory court) in one decision.

as well as the England Companies, had performed so-called cross-hauling in violation of their certificates, (4) that Strickland had unlawfully managed and controlled certain rights of England (La.) prior to the Commission's approval of the temporary lease arrangement, (5) that both purchase proposals were so different from that service lawfully rendered as to constitute a new service for which the public convenience and necessity must be proved, (6) that neither carrier had borne its burden of proof in showing a need for the new services, and (7) that neither Strickland nor Copperstate was entitled to any special consideration under the doctrine of color-of-right or because of an overriding public interest.

"Before the Commission's orders became effective, this action was filed. A temporary injunction and interlocutory judgment have stayed the effective date of the Commission's orders."

AUTHORITIES AND ARGUMENTS

Appellant sets out three questions (J.S. p. 5) which it says are so substantial as to require consideration by this Court. To the contrary, such questions have been determined, with finality, many times.

Obviously each of the three issues (questions) tendered by appellant are mere issues of fact.

Appellant is merely fretting about the fact determinations as made by the Commission and its conclusions as drawn therefrom.

But determination of the facts and the conclusions to be drawn therefrom are conclusive if the Commission has made adequate findings which are supported by substantial evidence — a rule too well known to require authority. Stated slightly differently, if a Commission order has a reasonable basis and is supported by substantial evidence, the courts must not interfere with it.

McLean Trucking Co. vs. United States, 321 U.S. 67, 87, is quite appropo here where it is said:

> "Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation but in its coordination of all other forms.' 79 Cong. Rec. 12,207. 'The wisdom and experience of the Commission,' not the courts, must determine," etc. p. 87 . . . "If Commission

did not exceed the statutory limits within which Congress confined its discretion and its findings are supported by evidence, it is not our function to upset its order." (at p. 88).

However, all this Court need do to convince itself that nothing is involved here except a dispute as to facts is to scan appellant's petition for reconsideration as filed with the Interstate Commerce Commission (in the ICC record, now before this Court), or the motion of appellant filed in the District Court "*to amend findings and make new findings.*" Filed on or about December 10, 1968, served on all parties on December 10, 1968. Appellant argues facts, facts.

But the Commission, not the courts, is the arbiter of the evidence, and where, as here, the findings of fact and conclusions of law are predicated on the prescribed criteria, adhered to in the Commission's decision, then this Court does not interfere with the Commission's exercise of its discretion. *U.S. vs. Pierce Auto Freight Lines*, 327 U.S. 515; *Interstate Commerce Commission vs. Union Pacific R. Co.*, 222 U.S. 541; *Rochester Telephone Co. vs. U.S.*, 307 U.S. 125; *Mississippi Valley Barge Line Co. vs. United States*, 292 U.S. 282.

Since here the Commission directly found a Section 5(4) violation, as well as violations of its rules, Section 307.5(c), and previous violations found in *Gordon-Strickland* complaint cases, see second paragraph Commission decision, p. 317, we should note that in *Rochester Telephone*, supra, this Court said that "This is an issue of fact to be determined by the special cir-

cumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand."

Appellant's question number 3 takes a little additional quirk. It asserts that appellant has "been deprived of essential procedural rights when the Commission rested its decision on factors not raised by the parties or previously considered in the proceeding and then denied Strickland any opportunity to respond to the new issues injected into the proceeding by the Commission's Report." (J.S. p. 3).

These are shockingly untrue assertions. It raises no question of procedural due process.

Violations of the statute and of the Commission's lawfully established rules and regulations go directly to the question of an applicant's fitness.

Section 307, 49 U.S.C. 307, provides that:

> "Subject to section 310 of this title, a certificate shall be issued to any qualified applicant . . . if it is found that the applicant is *fit*." etc.

The Commission in its decision in this case said: "*The question of fitness is always before us* in section 5 proceedings." 304 M.C.C. at p. 315. Emphasis supplied.

Appellant Strickland Transportation Co., Inc., and its attorneys were charged with notice of the law and of Commission rules and regulations. They knew or should have known that fitness is always an issue; that they had the burden to prove fitness.

Equally astonishing is the last phrase of question number 3 that the Commission "then denied Strickland any opportunity to respond to the *new* issue injected into the proceedings by the Commission's Report." What new issue? There was no new issue. If we can understand the so-called "Question," the so-called "new issue" is as old as the Motor Carrier Act, Interstate Commerce Act, Part II, itself.

But appellant says in its argument (J.S. at p. 21) that: But without warning and without affording Strickland any opportunity to respond to the *new* legal issues or to clarify the factual matters which the Commission *suddenly and unexpectedly* had decreed to be relevant . . ." etc. (This is an amazing statement).

As a matter of fact, there was the statute referred to above. *49 U.S.C. 307.* And as a matter of fact (if we can understand question 3 at all), protestants, intervening defendants here, raised the so-called *new issue* from the beginning.

All intervening defendants (protestants) filed a joint brief with the Examiner, served on *all parties* on November 9, 1965 (see ICC record), in which protestants (appellees here) set forth the proposition that:

> "Independent of other considerations, unlawful operations by vendors and vendees require denial of each application." See said brief, Table of Contents, p. VI.

This proposition was pursued beginning at page 28

of said brief and continuing through page 39. This discussion is carefully and liberally annotated to the ICC record. See pp. 28-36. Succeeding pages through 39 cite authorities, including *ABC Freight Forwarding Corp. vs. United States*, 125 Fed.Supp. 926, 929, affirmed 348 U.S. 967.

> "The Commission is better equipped than a court to reach a determination on the issues which have been entrusted to it. The Commission is charged with the determination as to whether granting the application would be consistent with the 'national transportation policy'. Part of that policy is 'to provide for fair and impartial regulation of all modes of transportation'. *It may well be that it would not be consistent with this policy to reward an applicant who has flouted the regulatory authority by extending its activities, illegally and through subterfuge, into an area for which no authority had yet been obtained.*" (Emphasis supplied)

Nothing was without "warning," or "opportunity to respond." The Commission did nothing "suddenly and unexpectedly." Appellant here did defend and appellees here did pursue the point on through appellant's "Petition for Reconsideration and Oral Argument and to Reopen to Receive Tendered Evidence." See said Petition in ICC record, dated at Oklahoma City, September 22, 1967.

No evidence was "tendered," however, at least in the commonly accepted meaning of the term. There was no prayer. Said Petition simply concluded with the following:

> "Wherefore, it is submitted that the Commission should reconsider its July 31, 1967, order and after such reconsideration make and issue its order adopting the recommendations of the Hearing Examiner." at p. 39.

But the Commission is the final determining authority.

Appellant Strickland's complaint in this case as filed in the court below, raises no such question as is now contained in question number 3 of its jurisdictional statement.

The decision of the District Court, Central District of California, must be affirmed.

As said in *Jacob Siegel vs. Federal Trade Commission*, 327 U.S. 608, 611-612:

> "The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy."

There is no substantial question of law here presented requiring this Court's attention. In summation, we quote from *Virginian R. Co. vs. United States*, 272 U.S. 658, 71 Ld.Ed. 463, 469:

> "The argument urged in this connection is appropriate for consideration by the Commission, and has presumably been duly considered by it.

> The fact that it has not proved persuasive affords no basis for the contention that the Commission's action in making the order was arbitrary or otherwise illegal."

The decision of the court below should be affirmed, and this appellee so prays.

Respectfully submitted,

MAURICE E. HIBBERT
WARREN N. GROSSMAN
KNAPP, GILL, HIBBERT
& STEVENS
825 City National Bank Building
606 South Olive Street
Los Angeles, California 90014

LAWRENCE A. WINKLE
BRASWELL MOTOR FREIGHT
LINES, INC.
Post Office Box 3989
Dallas, Texas 75208

T. S. Christopher

M. WARD BAILEY
T. S. CHRISTOPHER
CHRISTOPHER AND BAILEY
2412 Continental Life Building
Fort Worth, Texas 76102

Attorney for Appellee,
Braswell Motor Freight Lines, Inc.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1968

NO. 1141

STRICKLAND TRANSPORTATION COMPANY, INC, Appellant,

VS.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
CONSOLIDATED COPPERSTATE LINES,
ARKANSAS-BEST FREIGHT SYSTEM, INC.,
GORDONS TRANSPORTS, INC.,
BRASWELL MOTOR FREIGHT LINES, INC.,
CENTRAL FREIGHT LINES, INC.,
RED BALL MOTOR FREIGHT, INC.,
SAIA MOTOR FREIGHT LINES, INC.,
HERRIN TRANSPORTATION CO., and
RYDER TRUCK LINES, INC.,
Appellees.

CERTIFICATE OF SERVICE

I, T. S. Christopher, attorney for Appellee, Braswell Motor Freight Lines, Inc., and a member of the Bar of this Court, do hereby certify that I have this day served the "Motion to Affirm" of Braswell Motor Freight Lines, Inc., upon the parties to this action by

mailing copies thereof to:

The Solicitor General
Department of Justice
Washington, D. C. 20530

as service upon the Appellee, United States of America; to

Robert E. Ginnane, Esquire
Nahum Litt, Esquire
Office of the General Counsel
Interstate Commerce Commission
Washington, D. C. 20423

as service upon Appellee, Interstate Commerce Commission; to

Arnold Burke, Esquire
Axelrod, Goodman and Steiner
39 South LaSalle Street
Chicago, Illinois 60603

and to

Joseph D. Mullender, Jr., Esquire
Ball, Hunt, Hart and Brown
120 Linden Avenue
Long Beach, California 90802

as service upon Appellee, Consolidated Copperstate Lines; to

Reagan Sayers, Esquire
Clayte Binion, Esquire
Rawlings, Sayers & Scurlock
Century Life Bldg.
Post Office Box 17007
Fort Worth, Texas 76102

as service upon Appellee, Ryder Truck Lines, Inc., to

Phineas Stevens, Esquire
Suite 700—Petroleum Bldg.
Post Office Box 1250
Jackson, Mississippi 39205

and to

Robert E. Joyner, Esquire
2111 Sterick Building
Memphis, Tennessee 38103

as service upon Appellees Arkansas-Best Freight System, Inc., and Gordons Transports, Inc.; to

Mert Starnes, Esquire
James, Robinson, Felts & Starnes
The 904 Lavaca Building
Austin, Texas 78701

as service upon Appellees Central Freight Lines, Inc., Red Ball Motor Freight, Inc. and Saia Motor Freight Lines, Inc.; to

Leroy Hallman, Esquire
William E. Livingstone, III, Esquire
Phinney, Hallman, Pulley & Livingstone
4555 First National Bank Building
Dallas, Texas 75202

as service upon Appellee, Herrin Transportation Company; to

W. D. Beatenbough, Esquire
Vice President-Traffic
Ryder Truck Lines, Inc.
Post Office Box 2408
Jacksonville, Florida 32203

to

Charles L. Ford, Esquire
Texas Railroad Association
Post Office Box 1767
Austin, Texas 78767

to

Rollo E. Kidwell, Esquire
Post Office Box 10125
Dallas, Texas 75207

to

Charles D. Mathews, Esquire
Post Office Box 47407
Dallas, Texas 75247

to

Hugh T. Matthews, Esquire
Brooks, Montgomery & Matthews
630 Fidelity Union Tower
1507 Pacific Street
Dallas, Texas 75201

to

Franklin H. Wilson, Esquire
McCutchen, Black, Verleger & Shea
615 South Flower Street
Los Angeles, California 90017

and to

Theodore W. Russell, Esquire
Robert Y. Schureman, Esquire
1545 Wilshire Boulevard
Los Angeles, California 90017

as additional service upon various of the aforesaid Appellees; to

Dennis G. Lyons, Esquire
1229 Nineteenth Street, N. W.
Washington, D. C. 20036

to

W. T. Brunson, Esquire
419 Northwest Sixth Street
Oklahoma City, Oklahoma 73102

to

Joe A. Keith, Esquire
301 M. & P. Bank Building
Sherman, Texas 75090

as service upon Appellant, Strickland Transportation Company, Inc.; and I do further certify that such mailing was made, postage prepaid, this 28th day of March, 1969.

T. S. Christopher

T. S. CHRISTOPHER
2412 Continental Life Bldg.
Fort Worth, Texas 76102
Attorney for Appellee,
BRASWELL MOTOR FREIGHT LINES, INC.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 7 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 1141.

STRICKLAND TRANSPORTATION COMPANY, INC.,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ARKANSAS-BEST FREIGHT SYSTEM, INC., GORDONS TRANSPORTS, INC., BRASWELL MOTOR FREIGHT LINES, INC., RED BALL MOTOR FREIGHT, INC., and HERRIN TRANSPORTATION CO.,
Appellees.

On Appeal from the United States District Court for the Central District of California.

MOTION TO AFFIRM.

BUTLER, SNOW, O'MARA, STEVENS & CANNADA,
Post Office Box 22567,
Jackson, Mississippi 39205,

THOMAS HARPER,
Post Office Box 43,
Fort Smith, Arkansas 72901,

CHARLES D. MATHEWS,
Post Office Box 47404,
Dallas, Texas 75247,

WRAPE & HERNLY,
2111 Sterick Building,
Memphis, Tennessee 38103,
Of Counsel.

ROBERT E. JOYNER,
2111 Sterick Building,
Memphis, Tennessee 38103,

PHINEAS STEVENS
Post Office Box 22567,
Jackson, Mississippi 39205,

Attorneys for Appellees, Arkansas-Best Freight System, Inc., Gordons Transports, Inc., and Red Ball Motor Freight, Inc.

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CEntral 1-4477.

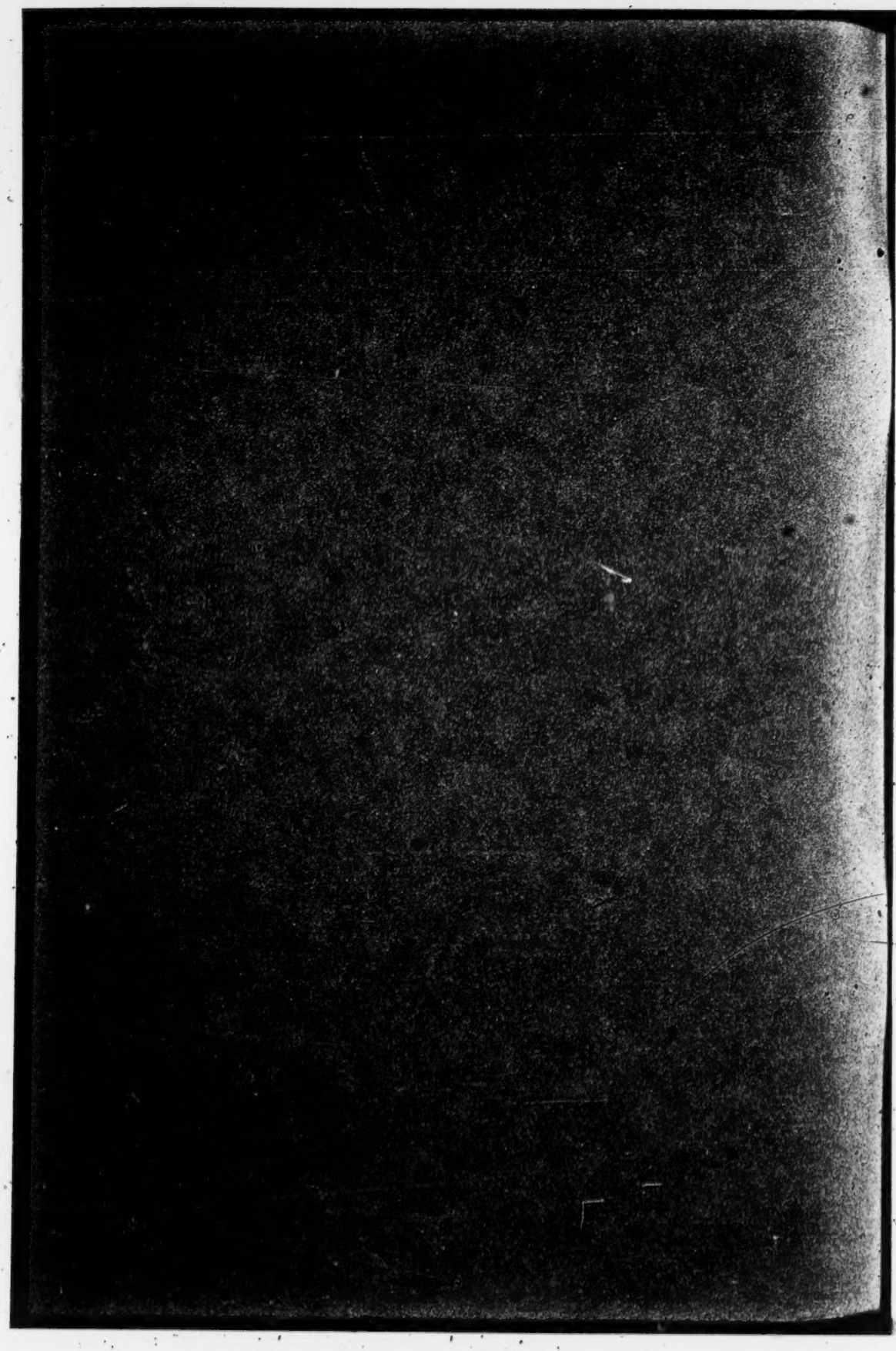


TABLE OF CONTENTS.

	Page
Preface	2
Statement of the case	3
Argument	10
I. No substantial federal question is involved	10
II. The Commission's decision is clearly correct	10
A. Strickland's proposed operations "would be of little public benefit," and "would be certain to harm the operations of existing carriers." 104 M. C. C. at 319	11
B. The "public convenience and necessity has not been shown to require operations by Strickland" over the proposed regular route between Shreveport and New Orleans. 104 M. C. C. at 326	12
C. Both Strickland and England failed to sustain their burden of showing fitness. 104 M. C. C. at 317	13
III. Discussion of "Questions presented in jurisdictional statement"	14
A. Jurisdictional statement question No. 1	14
B. Jurisdictional statement question No. 2	20
C. Jurisdictional statement question No. 3	25
Conclusion	26
Appendix A—Reply to protestants' exceptions to report and order of the Hearing Examiner	A-1
Appendix B—Petition for reconsideration and oral argument, and to reopen to receive tendered evidence	A-10

Cases Cited.

Classification of Motor Carriers of Property, 2 M. C. C. 703, 709 (1937) 4

Deaton Truck Lines, Inc.—Purchase—Lavendar, 97 M. C. C. 256 (1964), aff'd, Alabama Highway Express, Inc. v. United States, 241 F. Supp. 290 (N. D. Ala. 1965), aff'd, 382 U. S. 106 (1965) 21, 22

Ex Parte 230, Piggyback Service, 322 I. C. C. 301 (1964), rev'd in part, 244 F. Supp. 955 (N. D. Ill. 1965), aff'd, American Trucking Ass'ns v. Atchison, T. & S. F. R. Co., 387 U. S. 397 (1967) 19

Gordons Transp., Inc. v. Strickland Transp. Co., Inc., 318 I. C. C. 395 (1962), aff'd, 219 F. Supp. 618 (N. D. Tex. 1963) 5, 19, 20

Motor Common Carriers of Property—Routes and Service, 88 M. C. C. 415, 435 (1961) 8

Strickland Transportation Co., Inc.—Control—England Transportation Co., Inc., 85 M. C. C. 549 (1960) .....4, etc.

Strickland Transportation Co., Inc.—Purchase (Portion)—England Transportation Co., Inc., 104 M. C. C. 297 (J. S. App. C) .....2, etc.

Texas v. United States, 292 U. S. 522, 531 (1934) 11

Transportation Activities, Brady Transfer & Storage Co., 47 M. C. C. 23, 36 (1947) 4

United States v. Hancock Truck Lines, Inc., 324 U. S. 774, 779-780 (1945) 24

United States v. L. A. Tucker Truck Lines, 344 U. S. 33, 37 (1952) 25

Statutes Cited.

49 U. S. C., §§ 303 (c), 306 (a) (1) 5

Commissioner's General Rules of Practice, 49 C. F. R., § 1100.96 23

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 1141.

STRICKLAND TRANSPORTATION COMPANY, INC.,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ARKANSAS-BEST FREIGHT SYSTEM, INC., GORDONS TRANSPORTS, INC., BRASWELL MOTOR FREIGHT LINES, INC., RED BALL MOTOR FREIGHT, INC., and HERRIN TRANSPORTATION CO.,
Appellees.

On Appeal from the United States District Court for the Central District of California.

MOTION TO AFFIRM.

Pursuant to Rule 16.1 (c) and (d), appellees, Arkansas-Best Freight System, Inc., Gordons Transports, Inc., and Red Ball Motor Freight, Inc., respectfully move that the judgment below of the District Court (J. S. App. A) entered December 2, 1968, be affirmed, upon the grounds that the decision of the court below is correct, the decision of the Interstate Commerce Commission thereby upheld is correct, and the questions raised in the Jurisdictional Statement are manifestly so unsubstantial as not to need further argument.

PREFACE.

These appellees do not question the jurisdiction of this Court to review directly on appeal the decision below of the statutory three-judge court, which upheld unanimously a decision of the Interstate Commerce Commission. **Strickland Transportation Co., Inc.—Purchase (Portion)—England Transportation Co., Inc.**, 104 M. C. C. 297 (J. S. App. C). Neither do they question the applicability of the Interstate Commerce Act.

They do, however, question in succeeding portions of this motion, many statements asserted in the Jurisdictional Statement.

Moreover, they question the substantiality of the questions presented.

STATEMENT OF THE CASE.

Appellant's Jurisdictional Statement describes a case vastly different from that presented to and considered by the Interstate Commerce Commission ("Commission"). The issues stated are not those presented to the Commission or the court below, and facts stated vary in material respects from those of record. The record was quite extensive, and because numerous issues were involved that are not mentioned in the Jurisdictional Statement, certain background information is appropriate.

Involved here is one of a series of attempts by appellant, Strickland Transportation Co., Inc. ("Strickland"), to haul freight between its service points in the Northeast and Midwest, on the one hand, and, New Orleans, on the other; a service by Strickland for which public need or convenience has never been shown.

At present, Strickland has authority to serve New Orleans only via Dallas or Houston, not directly through points in northern Louisiana, such as Monroe and Shreveport. From and to Midwest and Northeast points, Strickland's most direct operations must come "by a circuitous route from Texarkana via Houston and Beaumont." 104 M. C. C. at 303.

This appeal involves primarily the proposal of Strickland to purchase certain operating authority now held by England Transportation Company ("England"). England is a small motor carrier with authority to transport general freight between New Orleans and all points in Louisiana over **irregular** routes. It is a local distribution carrier that has traditionally rendered a "simple peddle service" out of New Orleans. 104 M. C. C. at 319.

Strickland is an entirely different type of carrier. It is a large, long-haul, regular-route[1] carrier, operating over

[1] Appreciation of the important distinction between **regular**- and **irregular**-route operating authority is essential to certain

half of the United States. It has an east-west route into New Orleans extending across southern Louisiana from Houston, and routes from northern points extending as far south toward New Orleans as Shreveport and Monroe, La. But it has no operationally feasible route between New Orleans and Midwestern and Northern points.

Several years prior to the present proceeding, Strickland sought to acquire England by purchase of its capital stock. This acquisition would have permitted Strickland to operate via Shreveport and Monroe directly southward into New Orleans, thereby giving Strickland, for the first time, an operationally feasible route into New Orleans from its Midwestern and Northern points. This application was denied by the Commission, which concluded that any benefits to the public resulting from the proposal would be "scant"; that it "would adversely affect the efficiency and economy of" operations conducted by existing New Orleans carriers; that the operations of England "have been confined principally to a distribution service from New Orleans" and that "a radical change would result in the complexion of the operations of England and that following such change its operations would bear little resemblance to the service that has heretofore been provided under its rights." **Strickland Transportation Co., Inc.—Control—England Transportation Co., Inc.**, 85 M. C. C. 549 (1960).

---

issues involved. Regular-route carriers, such as Strickland, may render scheduled service over designated routes between fixed termini. Irregular-route carriers, such as England, are **prohibited** from performing such service. They are restricted to the rendition of unscheduled, call-on-demand service within their prescribed territory. The ICC has vigorously enforced this distinction: "Repeatedly . . . carriers have been warned that they cannot without appropriate authority convert an authorized irregular-route operation or service, in all or in part, into a regular-route operation or service." **Transportation Activities, Brady Transfer & Storage Co.**, 47 M. C. C. 23, 36 (1947). **Accord, Classification of Motor Carriers of Property**, 2 M. C. C. 703, 709 (1937).

Having failed in this effort to acquire an operationally feasible route into New Orleans from points north and east thereof, Strickland then set about to circumvent the Commission's decision by use of railroad piggyback service into New Orleans from St. Louis and Chicago. This maneuver was deemed unlawful by the Commission. **Gordons Transp., Inc. v. Strickland Transp. Co., Inc.**[2]

Strickland next set about, without Commission knowledge or approval, to use the England rights to move freight between Shreveport and New Orleans. Strickland has called this arrangement an "interchange" of freight. Appellees contended, and the Commission agreed, that there was no "interchange" of freight between Strickland and England. The arrangement was an ingenious subterfuge that consisted of operations **by Strickland** (not England) between Shreveport and New Orleans without appropriate authority. Accordingly, Strickland thereby placed itself in direct violation of the provisions of the Interstate Commerce Act requiring a carrier to hold an appropriate certificate or permit before engaging in operations over any particular route. 49 U. S. C., §§ 303 (c), 306 (a) (1).

During this period of unlawful operations by Strickland between Shreveport and New Orleans, both Strickland and England also participated in other unlawful operations ("cross-hauling"), ostensibly under England's authority. 104 M. C. C. at 317. England (but not Strickland) claimed such was done in reliance upon certain letters written by an ICC field representative, but the Commission recognized that the unlawfulness of such practices had been too clearly defined and prohibited "in cases too numerous to mention" to afford plausibility to any "color of right" claim. 104 M. C. C. at 317.

---

[2] 318 I. C. C. 395 (1962), **aff'd**, 219 F. Supp. 618 (N. D. Tex. 1963). This case is discussed in text accompanying note 14 *infra*.

While participating in the unlawful "interchange" arrangement, England declined to sign a collective bargaining agreement with its employees and chose instead to discontinue operations. England's equipment and operating rights were offered at auction. Strickland and another carrier[3] sought to carve up the England territory so that both would receive authority to serve New Orleans, Strickland from the north half of Louisiana and the other carrier from the south half.

Strickland and England then filed joint application seeking approval by the Commission under section 5 of the Interstate Commerce Act of the sale of this portion of the England rights. Strickland[4] also filed application under section 207 of the Act seeking issuance of new **regular**-route authority between Shreveport and New Orleans.[5] Since this application was conditioned upon approval of the corresponding purchase application, it was treated as an application to "convert" a portion of the England irregular-route authority into regular-route au-

---

[3] Consolidated Copperstate Lines. The resulting application seeking approval of the sale to Copperstate is the subject of a related proceeding now pending before this Court, No. 1128 O. T. 1968, **Consolidated Copperstate Lines v. United States.**

[4] Not Strickland **and England,** as stated in J. S., p. 11.

[5] J. S., p. 11, states: "On September 30, 1964, the Commission authorized Strickland to begin temporary operations over the Shreveport-New Orleans route pending decision upon its application, and on February 5, 1965, authorized temporary operations over the Monroe route." This is not correct. The Commission authorized only a temporary **lease** to Strickland of England's irregular-route authority. There is no "Shreveport-New Orleans route" and no "Monroe route" described in such lease or in the Commission's order granting temporary authority. 104 M. C. C. at 299. It is true, however, that Strickland has continuously operated under this temporary authority **as if it did authorize regular-route service.** This unlawful operation is being boldly continued pending disposition of this appeal.

thority, but only between Shreveport and New Orleans.[6] Both proceedings are involved in this appeal.

The Jurisdictional Statement throughout refers to Strickland's request to purchase "two England routes," one route between Shreveport and New Orleans and the second between Monroe and New Orleans depicted on the map, J. S., p. 9. See, *e. g.*, J. S., pp. 9, 10, 11, 24, 35, 36. **This is an inaccurate and misleading characterization of the operating rights involved.** England has no "Shreveport-New Orleans route" and no "Monroe-New Orleans route," as such. England has only the right to render unscheduled, call-on-demand, irregular-route service between New Orleans and **all** points, cities, towns and villages in Louisiana. Reference to two routes, however, patently reveals Strickland's purpose and intent in seeking acquisition of the England irregular-route authority. This purpose is the same now as when Strickland filed its initial application to purchase England. **Strickland obviously has no desire nor intent to serve the public in all points in Louisiana in the manner contemplated and intended by the Commission when the England rights were issued.** Strickland's only interest is direct, short-line, regular routes extending from Shreveport and Monroe to New Orleans to connect with other routes to provide service to the Northeast and Midwest.[7]

---

[6] The term "convert" is inaccurate, since there was no corresponding proposal by Strickland or England to surrender any of the irregular-route authority extending throughout the north half of Louisiana. 104 M. C. C. at 306. The § 207 application simply sought a new, regular route **in addition to** the England irregular routes. This application was necessary because Strickland's objective was to extend its regular-route, scheduled service into New Orleans via Shreveport and it recognized that acquisition of the England irregular-route authority would not permit the rendition of such scheduled service.

[7] Since Strickland cannot lawfully perform this scheduled service over England's irregular routes, the question might arise as to why the ICC would entertain an application such

In rejecting Strickland's first application to purchase England, the Commission concluded that "a radical change would result in the complexion of the operations of England" upon acquisition by Strickland; that the proposed operations "would bear little resemblance to the service that has heretofore been provided under its original rights"; and that "approval of the instant application would adversely affect the efficiency and economy of" existing operations to or from New Orleans. 85 M. C. C. at 555, 556.

In the proceeding now under review, **identical** conclusions were reached:

> Moreover, the effects of such a move, providing the final link over the Monroe gateway in a **regular** route extending from Boston to New Orleans would create a service which is so vastly different from the simple peddle service provided by England out of New Orleans that an entirely new and different

---

as this, seeking to join Strickland's regular routes with England's irregular routes. The answer is: Strickland, as a regular-route carrier, is not **prohibited** from performing unscheduled, call-on-demand service over its regular routes. It therefore **could** lawfully perform this limited type of service over its regular routes combined with England's irregular routes. Strickland's proposal is objectionable because it proposes only to extend its **scheduled, regular**-route type of operation over England's **irregular** routes, thereby violating the Commission's requirement "that where regular- and irregular-route authorities are combined, it is the character of the irregular-route service which must be maintained. . . . This is necessarily so because, although an irregular-route carrier is not permitted to provide a regular-route service, a regular-route carrier, so long as it provides reasonably adequate service at the points on its routes which it is authorized to serve, is not required to operate according to a fixed schedule and is not restricted against the performance of a call-on-demand, truckload type of service." **Motor Common Carriers of Property—Routes and Service**, 88 M. C. C. 415, 435 (1961). Strickland does not render **and does not propose to render** any unscheduled, call-on-demand service, either throughout north Louisiana or between New Orleans and Shreveport or Monroe.

> service would be created, which could not but have an adverse effect on the existing competitive situation. . . . As we found in the **prior Strickland-England** case, the acquisition of England's irregular route rights by Strickland and conversion to a link in its long-line regular routes would be of little public benefit and would be certain to harm the operations of existing carriers. 104 M. C. C. at 318-319.

In the prior proceeding, Strickland was not given temporary authority to operate England pending determination of the purchase application, and Strickland did not appeal from the Commission decision denying the purchase. Here, temporary authority was granted[8] and, by prosecuting appeals and obtaining stays Strickland has prolonged its operations under such temporary authority for nearly five years. Ironically, however, it is significant to note that in the present decision, the Commission denied the application for the **identical** reasons that required denial of the first application, **plus several additional reasons not present in the first case.**

---

[8] Without a hearing, based upon allegations no longer pertinent.

ARGUMENT.

I.

No Substantial Federal Question Is Involved.

The Jurisdictional Statement presents three questions. In these, Strickland has ignored the clear pronouncement by the Commission that the applications under review were "denied for all the foregoing reasons" specified. 104 M. C. C. at 319. The Jurisdictional Statement makes no mention whatever of the most important of these reasons, being the identical reasons which required denial in the first **Strickland-England** case. These reasons are by no means unique. On the contrary, they are the same type of reasons traditionally found in decisions of the Commission in section 5 proceedings. Basically, the Commission simply held that, as in the first **Strickland-England** case, the applicants failed to sustain their burden of establishing that the proposal would be "consistent with the public interest."

Appellant does not deny that the court below considered and applied "the established rules of judicial review," summarized in the court's opinion. Neither does the Jurisdictional Statement demonstrate that the lower court erred in concluding "the proceedings establishes that the Commission's orders were based on substantial evidence and according to applicable law" (J. S. App. A).

There is, therefore, no new, novel, or substantial question presented by this appeal.

II.

The Commission's Decision Is Clearly Correct.

The Commission predicated its decision upon several different grounds, clearly specified in its report, and concluded that the applications "will be denied for all the foregoing reasons."

A. Strickland's proposed operations "would be of little public benefit," and "would be certain to harm the operations of existing carriers." 104 M. C. C. at 319.

These findings concern the fundamental issue before the Commission in any section 5 proceeding, *i. e.*, the statutory requirement that applicant prove the proposed transaction to be consistent with the public interest. As stated in **Texas v. United States**, 292 U. S. 522, 531 (1934), the criterion in proceedings of this nature "is that of the controlling public interest." As used in the statute, that term "is not a mere general reference to public welfare, but, as shown by the context and purpose of the Act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities.'"

In considering the "best use of transportation facilities," the Commission recognized that the Strickland proposal "would create a service which is so vastly different from the simple peddle service provided by England out of New Orleans that an entirely new and different service would be created which could not but have an adverse effect on the existing competitive situation." 104 M. C. C. at 319.

These reasons, standing alone, required denial of the first **Strickland-England** case. The Commission expressly recognized that the same conclusions are required here "as we found in the **prior Strickland-England** case." Accordingly, because Strickland is proposing again to use the same England rights in an improper manner, and Strickland is proposing again a new service of "little public benefit," and because the proposal again "would be certain to harm the operations of existing carriers," the Commission denied again the application upon the specific criteria of **Texas v. United States.** These reasons

were sufficient in the first case and adequately support the Commission's denial in the instant case.

B. **The "public convenience and necessity has not been shown to require operations by Strickland" over the proposed regular route between Shreveport and New Orleans. 104 M. C. C. at 326.**

Strickland cannot lawfully perform its proposed type of operations to and from New Orleans without possessing **regular**-route authority.[9] In the section 5 proceeding it sought to purchase **irregular**-route authority which would not suffice for this purpose. Accordingly, Strickland also filed its section 207 application seeking regular-route authority between Shreveport and New Orleans and presented evidence seeking to establish that the public convenience and necessity require such operations. **The evidence presented, however, was nominal.** Only **seven** shippers or receivers of freight testified. **None mentioned deficiencies in existing service.** In discussing this evidence, the Commission found:

> The shipper testimony here is mostly from shippers far distant from the routes involved, shippers who have many alternative methods of handling their traffic. Even those whose traffic is more local to the area seem to have no real complaints of inadequate service from existing carriers. Without support of lawful prior operations involving similar traffic, the testimony of shippers supporting the Strickland applications does not show any public convenience and necessity such as to mitigate or excuse the unlawfulness of both the applicants in their joint operations.[10] 104 M. C. C. at 319.

---

[9] See notes 1 and 7 *supra*.

[10] No contention was advanced before the Commission or the District Court that there are any deficiencies or inadequacies in the existing transportation system.

Without the requested regular route, Strickland could not lawfully perform its proposed service. Without an established public need such authority could not properly be granted. The Commission, therefore, was unquestionably correct in concluding that "the public convenience and necessity has not been shown to require operation by Strickland" between Shreveport and New Orleans. Therefore, the Commission had no alternative but to deny the section 207 application. Without the regular route requested in that proceeding, the Commission could not have approved acquisition by Strickland of England's irregular routes, because Strickland at no time proposed to render an irregular-route service.

C. Both Strickland and England failed to sustain their burden of showing fitness. 104 M. C. C. at 317.

The Commission properly recognized that "The question of fitness is always before us in section 5 proceedings." 104 M. C. C. at 315. It is also a statutory requirement in section 207 proceedings. The Commission gave careful consideration to the alleged Strickland-England "interchange" arrangements and concluded that "they constitute operations by Strickland without possession of a certificate." 104 M. C. C. at 316. Strickland, therefore, was found to be operating in violation of the certificate requirements of the Act. 49 U. S. C., §§ 303 (c), 306 (a) (1). The Commission stated: "Any way we slice the apple of the arrangement between applicants it comes out wormy." 104 M. C. C. at 317. Strickland's "speculative" use of these "novel" arrangements was characterized as boldness bordering "on foolhardiness." 104 M. C. C. at 317.

Regarding the consequences of these unauthorized activities, the Commission concluded:

> While we have sometimes approved applications under section 5 despite unlawful prior operations of

vendor, such a finding is generally where vendor but not vendee committed the violations, where the operations were conducted under color of right in the honest belief that they were lawful, where an overriding public need for lawful future operations was shown, or where all such elements were present. Here none of these exceptional conditions seems to exist. 104 M. C. C. at 317.

Unquestionably, therefore, the Commission was precluded from finding that this proposed vendee was fit to receive the operating authority sought, or to perform the new services proposed. Because "such unlawfulness reflects adversely on the fitness of both applicants," the Commission had to deny the section 5 and the section 207 applications.

III.

Discussion of "Questions Presented in Jurisdictional Statement."

A. Jurisdictional Statement Question No. 1.

The first question described in the Jurisdictional Statement challenges the Commission's finding that the Strickland-England "interchange" of trailers was unlawful. The thrust of appellant's arguments centers on this question. However, this question was not essential to the Commission's denial of the applications.

This illegality had nothing to do with the finding that public convenience and necessity do not require the regular-route service of Strickland proposed in the section 207 application. That application was denied on the traditional grounds of the applicant's failure to establish public need for the proposed service. The approval of that application was essential to the performance by Strickland of the regular-route service proposed between

Shreveport and New Orleans, and when it fell for lack of proof, the corresponding section 5 application fell.

The illegality of the Strickland-England "interchange" had nothing to do with the Commission's conclusion that "an entirely new and different service would be created" by Strickland's proposed operations; the Strickland proposal "would be of little public interest"; would have "an adverse effect on the existing competitive situation," or "would be certain to harm the operations of existing carriers." These conclusions compelled the Commission to deny the section 5 application because of applicant's failure to sustain their burden of establishing that the proposal would be "consistent with the public interest," as required by the statute.

The unlawfulness of this arrangement did influence the Commission in reaching the conclusion that both applicants are unfit, but this was not the sole justification for this conclusion. Both Strickland and England were also guilty of unlawful "cross-hauling."[11] 104 M. C. C. at 317.

We will not burden the Court with all facts supporting the Commission's conclusion that the Strickland-England "interchange" was unlawful.

Appellant here, as in the court below, primarily argues the legality of the arrangement in the light of the Commission's rules and regulations governing the lease and interchange of vehicles. The Commission did specify a provision of these regulations violated by the parties.

---

[11] Both applicants have a history of unlawful activities. The present owner of England purchased the company without requisite Commission approval, granted only after institution of an investigation. 104 M. C. C. at 301. Strickland, as noted, unlawfully utilized piggyback service into New Orleans. In Strickland's brief before the District Court, this activity was sought to be justified by the comment: ". . . we are confident that members of this Court are aware that 'lawful' and 'unlawful' in Interstate Commerce Commission matters do not generally connote impropriety. . . ." Obviously, the Commission felt otherwise.

In doing so, the Commission was eminently correct, but this was only an incidental finding. The Commission's ultimate conclusion of unlawfulness had nothing to do with any violation of the Commission's leasing and interchange rules. This conclusion was founded squarely on the provisions of sections 203 (c) and 206 (a) (1) of the Act, prohibiting a common carrier from operating without a certificate. Here, Strickland had no authority to operate between Shreveport and New Orleans. The Commission concluded, however, that the operations in question "were really under the management and control of Strickland." These operations "constitute operations by Strickland without possession of a certificate." In reaching this conclusion, the Commission pointed out that there is nothing in the record "to suggest that England (La.) exercised control or responsibility over the traffic or that it functioned as an independent interchange carrier, as required by law." 104 M. C. C. at 316.

In other words, the Commission did not conclude, as suggested by appellant, that the parties improperly conducted the physical and technical requirements incident to an interchange of traffic. The Commission concluded that **there was no interchange.**

The District Court found the Commission's conclusion amply supported by the record. England never assumed any responsibilities as carrier in relation to the shipping or receiving public. Obviously, if the operation was that of England, rather than Strickland, it would be essential for England to have the legal responsibilities attendant to the carrier-shipper relationship.

Recognizing that the record clearly shows that England assumed no liability or responsibility for any loss or damage, appellant argues that this testimony is not consistent with the statute imposing such responsibility on England, regardless of the parties' efforts to avoid such liability; that in legal effect, the arrangement actually

recognized England's liability to the public and constituted an agreement whereby Strickland was to "indemnify" England.

Unfortunately, however, there is not one word of evidence to sustain this position. It is a new concept asserted for the first time in this Court. The unequivocal testimony of the representatives of Strickland and England was that Strickland assumed all responsibility to the public for loss or damage to the cargo and England assumed none. The Commission so found, and appellant can cite no evidence that lends doubt to the propriety of this finding. 104 M. C. C. at 316.

More significant, however, is the manner in which the parties received and delivered such traffic. England, for example, held full authority to serve New Orleans. If the traffic destined to New Orleans had, in fact, been interchanged at Shreveport from Strickland to England, it would have then become England's traffic for further movement to and delivery in New Orleans. Admittedly, however, this was not done. At New Orleans the traffic was delivered by Strickland—not by England. In briefs in the court below Strickland admitted that this was done because the traffic was "Strickland's freight." For example:

> This traffic was billed by Strickland as its own freight in the same way it bills traffic that moves between any other of its on-line points. (Strickland's District Court Brief, page 31.)
>
> . . .
>
> Inasmuch as the freight being interlined or interchanged between Strickland and England (La.) was Strickland freight, England had neither an obligation to or a right to perform pickup, delivery or collection services in connection therewith. (Strickland's District Court Brief, page 39.)

In like manner, some southbound freight moving through Shreveport was destined to points beyond New Orleans. In those instances, Strickland would deliver such freight to England **at New Orleans** for movement by England to destination. Obviously, if this was England's freight received at **Shreveport**, England would have **retained** possession for delivery to ultimate destination. Instead, the freight was placed in England's possession and control at New Orleans, not at Shreveport. This conclusively proves that the parties considered the Shreveport-New Orleans operation under the exclusive direction and control of Strickland—a clear violation of sections 203 (c) and 206 (a) (1).

Strickland argues that the Commission overruled protestants' contentions and based its conclusion on a theory not advanced nor argued before the Commission. See, *e. g.*, J. S., p. 14. Some protestants did attack the legality of the "interchange" on several grounds, some of which were rejected by the Commission. However, these appellees, as protestants before the Commission, vigorously attacked the legality of the "interchange" when the arrangement was first made known to the parties. This occurred **when the first witness testified.** This attack was vigorously pursued in briefs before the Hearing Examiner. When the Examiner ignored these arguments, detailed exceptions were filed specifying the Examiner's error in rejecting requested findings that the arrangement "did not constitute a bona fide interchange of freight between said carriers." Appellees argued vigorously before the Commission that: "these facts clearly show that no 'interchange' of traffic took place"; that the freight remained the freight of Strickland and did not pass to the control of England for movement between Shreveport and New Orleans. **These contentions were specifically sustained by the Commission.** 104 M. C. C. at 316.

Instead of an "unexpected attack on the legality of the interchange," as charged by appellant (J. S., p. 24), it

was a continuous and vigorous attack asserted by appellees at the hearing and in every pleading and brief filed before the Commission.[12]

Notice should be taken of appellant's arguments concerning Strickland's unlawful use of piggyback service and the subsequent rulings of the Commission in **Ex Parte 230, Piggyback Service.**[13] The Jurisdictional Statement takes the position that the Commission, in **Ex Parte 230,** reached a conclusion contrary to its prior conclusion in **Gordons.**[14] This is by no means correct. The sole ground of the Commission's decision in **Gordons** was that, by use rail service, Strickland was engaging in a competitively effective operation **not possible under its authorized operating authority.** Strickland's use of piggyback service was condemned because "Substituted service, in our opinion, should bear some reasonable relationship to the authorized motor carrier service for which it is substituted." In effect, the Commission concluded that, by use of the rail facilities, Strickland was performing a **new** service rather than a **substituted** service.[15]

---

[12] Appellant referred to comments in the Examiner's report to the effect that other carriers, including protestants, have engaged in similar "interchange" practices. J. S., p. 13. This voluntary comment of the Examiner was not predicated upon any facts of record and was vigorously denied by protestants. There is not a word of evidence that could support such statement and it really had nothing to do with the issues here involved.

[13] 322 I. C. C. 301 (1964), **rev'd in part,** 244 F. Supp. 955 (N. D. Ill. 1965), **aff'd, American Trucking Ass'ns v. Atchison, T. & S. F. R. Co.,** 387 U. S. 397 (1967).

[14] **Gordons Transp., Inc. v. Strickland Transp. Co., Inc.,** 318 I. C. C. 395 (1962), **aff'd,** 219 F. Supp. 618 (N. D. Tex. 1963).

[15] 318 I. C. C. at 401: "There is no indication that Strickland has transported, or could transport economically, a substantial volume of traffic between the considered points over its route via Houston. Approval of the suspended schedules and of the manner in which Strickland is now operating, under these circumstances, would be contrary to the concept of substituted

The principle which underlies **Gordons** was reaffirmed, not repudiated, in **Ex Parte 230.**[16] Under the Commission's present rules, promulgated pursuant to **Ex Parte No. 230,** Strickland cannot lawfully utilize piggyback service between New Orleans and any points north or east thereof.[17] The specific operation found unlawful in **Gordons** would be unlawful today (otherwise Strickland obviously would be again utilizing such service). In like manner, Strickland cannot lawfully use piggyback service between Shreveport and New Orleans.

B. **Jurisdictional Statement Question No. 2.**

The Jurisdictional Statement describes the second question:

> Did the Commission err in declining to approve the purchase by Strickland of England's Monroe-New Orleans operating rights on the ground that the Hearing Examiner had *sua sponte* recommended the con-

---

service and would sanction operations which, competitively, are wholly unlike and unrelated to those authorized by its certificate. Accordingly, we conclude that the present and proposed use of TOFC service by Strickland between the considered points is a destructive competitive practice and is unlawful."

[16] "A regular-route motor carrier is restricted to operation over certain highways, and as its business expands and its operating authority increases on a piecemeal basis, it is likely to find itself with authorized routes between certain points in its system which are not the most direct available. To allow carriers to ignore the routing and gateway limitations in their operating authorities and to provide service between any points they serve, no matter how indirect their authorized operations, would be to allow them to provide totally new services for which no public need had been established, and would largely negate the certificate and permit requirements of the Act." 322 I. C. C. at 361.

[17] Such service cannot be utilized "where the distance from origin to distination over the route including the TOFC movement is less than 85 percent of the distance between such points over the motor or water carrier's authorized service route." 49 C. F. R., § 1090.5.

> version of the irregular authority for which Strickland had applied to regular authority, and that the resulting regular authority—for which Strickland had not applied—was a 'new service' requiring a fresh showing of public convenience and necessity to authorize its transfer?

Contrary to the position that Strickland took before the Commission, it now recognizes that the Examiner *sua sponte* recommended that all of England's irregular-route authority be cancelled and, in lieu thereof, Strickland be granted (1) the regular route applied for in the section 207 application [Shreveport-New Orleans] and (2) a new regular route [Monroe-New Orleans], not applied for by Strickland, not discussed during the hearing, not mentioned in briefs before the Examiner, and, obviously, not expected by Strickland.

Before the Commission, Strickland took the position that the Examiner acted **properly** and **urged the Commission to permit Strickland to receive the benefits of this windfall.** Never did Strickland suggest that the Examiner erred in granting this gratuity.[18] Protestants before the

---

[18] Even in the Jurisdictional Statement there is a suggestion that the Examiner's recommendation was supported by precedent (J. S., p. 14, n. 11). Unfortunately, however, in referring to such precedent, appellant has inadvertently stated the opposite of the actual finding of the ICC in this, the only case on the point. The Examiner relied upon **Deaton Truck Lines, Inc. —Purchase—Lavendar**, 97 M. C. C. 256 (1964), **aff'd, Alabama Highway Express, Inc. v. United States**, 241 F. Supp. 290 (N. D. Ala. 1965), **aff'd**, 382 U. S. 106 (1965). Appellant states that this case "holds that the Commission may condition the grant of a § 5 transfer application on a conversion of irregular route authority to regular." The exact opposite was actually involved in that proceeding. The Commission there approved a transfer conditioned upon the vendee's willingness to have **regular**-route authority converted to **irregular** route. Clearly this is acceptable, since a regular-route carrier can perform the identical service rendered by an irregular-route carrier between authorized points, but an irrgular-route carrier is prohibited from render-

Commission, including appellees here, filed exceptions vigorously attacking the propriety of the Examiner's recommendations. In reply, Strickland made no argument seeking to justify or defend the Examiner's startling recommendation and made no specific response to extensive contentions advanced by numerous protestants. However, Strickland's reply ended with the following Conclusion:

> By reason of the foregoing, applicants pray that the Commission adopt the report and order recommended by the examiner in No. MC-F-8798, with the previously discussed modification, and grant the application in No. MC-59680, Sub 142.[19]

In discussing this question, Strickland argues (J. S., pp. 18, 35) that the Commission has never passed upon Strickland's application as filed, this being the application to purchase England's irregular-route authority, and asserts that the Commission addressed itself only to the propriety of accepting or rejecting the Examiner's recommendations.

It would have been entirely proper for the Commission to have considered only the propriety of accepting or rejecting the Examiner's recommendations, **since Strickland**

---

ing the scheduled service customarily rendered by regular-route carriers. See notes 1 and 7 *supra*. **Deaton** supports the propriety of a condition **diminishing** the operating rights involved, whereas in the case at bar the Hearing Examiner attempted to **enlarge** such rights "without any request by applicant or publication to the public." 104 M. C. C. at 318.

[19] Strickland's reply is attached as Appendix A. Appellees, as protestants before the Commission, collectively filed extensive specific exceptions to the Examiner's report. These exceptions, totaling over 200 pages, included numerous different contentions. See 104 M. C. C. at 310-312.

The modification in the Examiner's recommendations suggested in Strickland's reply related only to the Examiner's requirement that the Strickland application and the Consolidated application [now before this Court in the related proceeding, No. 1128] **both** be consummated as a condition of approval.

did not file any exceptions to the Examiner's report.[20] As noted, Strickland was content to file a general reply to all exceptions urging "that the Commission adopt the report and order recommended by the examiner."

Actually, however, the Commission did give consideration to Strickland's initial proposal to purchase England's irregular-route authority. After rejecting the Examiner's "ingenious" proposal to elevate the authority from irregular to regular, the Commission did proceed to consider the propriety of approving the acquisition by Strickland of England's **irregular**-route authority:

> As we found in the **prior Strickland-England** case, the acquisition of England's irregular route rights by Strickland and conversion to a link in its long-line regular routes would be of little public benefit and would be certain to harm the operations of existing carriers. 104 M. C. C. at 319.

In other words, the Commission here, as in the prior **Strickland-England** case, concluded that it would not be consistent with the public interest to approve the acquisition by Strickland of England's irregular-route rights. The only difference is that in the instant case the Commission concluded that the proposal would be of "little" public benefit whereas in the initial case it concluded that it would be of "scant" public benefit. See 85 M. C. C. at 557.

Following the Commission's decision, Strickland exercised its right to file a petition for reconsideration. Again, however, **Strickland chose not to suggest that the Examiner erred in recommending the cancellation of England's irregular-route authority and the issuance of regular-route**

---

[20] Exceptions to an Examiner's Report are required by the Commission's General Rules of Practice. 49 C. F. R., § 1100.96. The minor modification requested by Strickland, note 19 *supra*, was improperly embodied in its reply to protestants' exceptions, rather than in exceptions.

authority in lieu thereof. Strickland's position before the Commission at this final stage of the administrative proceeding was the same as following the issuance of the Examiner's report, shown by the prayer of the petition for reconsideration:

> WHEREFORE, it is submitted that the Commission should reconsider its July 31, 1967 order and after such reconsideration, make and issue its order adopting the recommendations of the Hearing Examiner.[21]

It is obvious that Strickland took this position in recognition that the record could not support a finding in the present case different from that in the original **Strickland-England** case. The Examiner could find no way of approving acquisition by Strickland of England's irregular routes, the propriety of this proposal having previously been disapproved by the Commission, and the Examiner sought to avoid denial by proposing the solution termed "ingenious" by the Commission. 104 M. C. C. at 318. Following the issuance of the Examiner's report, Strickland never suggested to the Commission that the Examiner's "solution" should be rejected and the application approved as filed.

Strickland cannot assign as error before this Court action of the Commission not complained of by Strickland before the Commission.[22]

---

[21] The following portions of Strickland's petition are attached as Appendix B: Caption and Introduction (from page 1) and Basis for Reconsideration and Approval (pages 37-39). Appendices 1-4 to said petition appear in the Jurisdictional Statement as Appendix G, pp. 53a-61a. Appellees contended, and the Commission agreed, that the additional documents proffered with the petition would add nothing of value to the record. See Commission Order, J. S., App. D, pp. 41a-43a.

[22] "It was manifestly improper to reverse the Commission's order in respect of a provision therein as to which the suitor had advised that body it no longer objected but acquiesced." **United States v. Hancock Truck Lines, Inc.**, 324 U. S. 774, 779-780 (1945). ". . . orderly procedure and good administration re-

C. **Jurisdictional Statement Question No. 3.**

The Jurisdictional Statement contends that this proceeding involves one in which the Commission "rested its decision on factors not raised by the parties or previously considered in the proceeding and then denied Strickland any opportunity to respond to the new issues injected into the proceeding by the Commission's Report" (J. S., p. 5).

There is no discussion of this question in the Jurisdictional Statement, but repeated reference is made to appellant's contention that the Commission found the Strickland-England "interchange" unlawful on grounds not suggested by protestants. This contention is without foundation.

The Commission found that the arrangement constituted operations by Strickland without authority, thereby sustaining a contention asserted by protestants at the outset of the hearing, in their briefs before the Hearing Examiner, and vigorously pressed by protestants in their exceptions to the Examiner's report and again in their reply to Strickland's petition for reconsideration.

Reference is also made to the Commission's failure to address itself "to the actual application of the parties—namely, that England's **irregular**-route authority to Monroe be transferred to Strickland" (J. S., pp. 18, 35). This is the same contention previously discussed. Although Strickland waived its right to contend that the Examiner should have approved the application as filed, by failing to file exceptions or otherwise to complain, the Commission

---

quire that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. . . . Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." **United States v. L. A. Tucker Truck Lines,** 344 U. S. 33, 37 (1952).

did consider the application as filed and did reach the conclusion that it could not be approved, since it was not consistent with the public interest. 104 M. C. C. at 319.

CONCLUSION.

We respectfully submit that the case should be affirmed.

Respectfully submitted,

.....

ROBERT E. JOYNER,
2111 Sterick Building,
Memphis, Tennessee 38103,

.....

PHINEAS STEVENS,
Post Office Box 22567,
Jackson, Mississippi 39205,

Attorneys for Appellees, Arkansas-Best Freight System, Inc., Gordons Transports, Inc. and Red Ball Motor Freight, Inc.

Of Counsel:

BUTLER, SNOW, O'MARA, STEVENS & CANNADA,
Post Office Box 22567,
Jackson, Mississippi 39205,

THOMAS HARPER,
Post Office Box 43,
Fort Smith, Arkansas 72901,

CHARLES D. MATHEWS,
Post Office Box 47404
Dallas, Texas 75247,

WRAPE & HERNLY,
2111 Sterick Building,
Memphis, Tennessee 38103.

APPENDIX A

Preliminary Statement.

APPENDIX A.

Before the Interstate Commerce Commission.

Re: Strickland Transportation Co., Inc.—Purchase (Portion)—England Transportation Co., Inc.	Docket No. MC-F-8798.
Strickland Transportation Co., Inc., Extension—New Orleans.	Docket No. MC 59680, Sub 142.

Reply of
Strickland Transportation Co., Inc.
and
England Transportation Co., Inc.
to Protestants' Exceptions
to Report and Order of the Hearing Examiner.

Preliminary Statement.

The above-captioned proceedings were heard on a consolidated record with two other proceedings.[1] By report and order served May 16, 1966, the Hearing Examiner recommended approval of the four applications, subject to certain conditions.

Exceptions to the Examiner's recommendations in the four proceedings have been filed by the several protestants therein. Replies to those Exceptions, insofar as they relate to the two applications in footnote (1), will be filed by counsel for the applicants therein.

---

[1] No. MC-F-8808, Consolidated Copperstate Lines—Purchase (Portion)—England Transportation Co., Inc., and England Trasportation Company of Texas, and No. MC 22167 (Sub No. 21), Consolidated Copperstate Lines—Extension—Louisiana Points.

This joint reply of Strickland Transportation Co., Inc., vendee, and England Transportation Co., Inc., vendor, herein called Strickland and England, respectively, is directed solely to the exceptions filed in the above-captioned proceedings, either individually or jointly, by protestants Arkansas-Best Freight System, Inc., Braswell Motor Freight Lines, Inc., Campbell Sixty-Six Express, Inc., Gordons Transports, Inc., Herrin Transportation Co., and Red Ball Motor Freight, Inc., herein called Arkansas-Best, Braswell, Campbell Sixty-Six, Gordons, and Red Ball, respectively. East Texas Motor Freight Lines, Inc., herein called East Texas, also opposed the applications at the hearing but filed no exceptions to the examiner's recommendations.

The interests of the several protestants herein do not differ materially, and their contentions, as set forth in detail in their various exceptions, are in general the same. Their exceptions all recite that the examiner's recommended report accurately summarizes the facts with relation to the applications and the proposed transactions. The post hearing briefs filed by all parties herein set forth the list of authorities relied upon by them in support of their respective positions. Accordingly, in the interest of brevity and to avoid lengthy repetition, the facts and citations, as well as protestants' exceptions, will not be repeated herein.

Argument in Support of Reply.

Applicants submit that, despite the myriad "smoke screens" set forth in protestants' exceptions, their sole interest in these proceedings and in fact the paramount issue herein so far as they are concerned, is whether operations by Strickland under the unified rights would adversely affect the existing operations of protestants. In support of their allegations that they would be so affected, all submitted evi-

dence showing their operating authority, equipment, terminals, and the service which they represent they offer to the shipping public. However, protestants failed to submit any specific evidence of actual traffic which would be lost by them as a result of approval herein. East Texas presented no evidence of its traffic. The other protestants, while submitting some studies of traffic transported by them in the Strickland-England territory during certain representative periods of time, could only guess as to a possible loss of traffic they might suffer.

The best evidence of whether approval of the transactions would adversely affect protestants is evidence showing their revenues, income, and operating ratios prior to commencement by Strickland of operations under temporary authority compared to their revenues, income, and operating ratios after institution of, and during the period of, operations by Strickland under temporary authority. The parties stipulated in the record that references could be made to the annual reports filed by them with the Commission with reference thereto. Those figures as set forth in such reports are presented in the following tabulation:

	1963	1964	1965
Arkansas Best			
Revenues	$19,133,036	$20,985,109	$24,183,938
Net Income, Before Taxes	952,027	1,181,037	1,418,990
Net Income, After Taxes	509,363	829,205	812,151
Operating Ratio	93.1	93.7	93.1
Braswell			
Revenues	3,258,347	6,594,667	10,231,070
Net Income, Before Taxes	196,698	359,380	499,111
Net Income, After Taxes	37,713	146,582	283,035
Operating Ratio	97.7	94.2	94.8
Gordons			
Revenues	23,585,092	25,903,273	29,416,696
Net Income, Before Taxes	968,409	2,087,628	2,828,862
Net Income, After Taxes	673,422	1,295,907	1,863,716
Operating Ratio	95.0	90.7	89.7
East Texas			
Revenues	20,901,125	22,828,097	27,711,642
Net Income, Before Taxes	1,457,897	1,808,100	2,553,037
Net Income, After Taxes	856,631	723,386	1,631,540
Operating Ratio	92.1	91.3	90.2
Campbell Sixty-Six			
Revenues	19,361,964	20,940,676	21,590,456
Net Income, Before Taxes	1,380,634	1,151,058	906,695
Net Income, After Taxes	780,598	715,739	467,802
Operating Ratio	92.6	93.0	95.5
Red Ball			
Revenues	26,801,221	30,402,984	36,001,541
Net Income, Before Taxes	1,977,026	2,321,952	2,598,470
Net Income, After Taxes	1,051,000	1,167,663	1,185,831
Operating Ratio	92.6	92.7	92.4
Herrin			
Revenues	12,606,251	12,301,278	12,975,249
Net Income, Before Taxes	425,194	231,247	334,026
Net Income, After Taxes	203,041	115,026	162,804
Operating Ratio	96.7	98.1	97.4
Strickland			
Revenues	25,841,915	28,487,166	30,324,534
Net Income, Before Taxes	439,657	1,224,653	550,632
Net Income, After Taxes	326,015	745,814	320,428
Operating Ratio	97.1	94.6	96.7

Note: For proper comparison with 1965, the figures for Strickland in 1963 and for Braswell and Red Ball for 1963 and 1964 include figures of affiliated carriers merged into the parent company prior to 1965.

Strickland began operations under temporary authority on October 5, 1964. Protestants' revenues as set forth in the above tabulation reflect their actual operations for a period of 21 months prior to the commencement by Strickland of operations under temporary authority and for a period of 15 months thereafter. If approval of the applications were to have an adverse affect on protestants' operations it certainly would be reflected in their revenues for 1965. The foregoing tabulation, however, is positive proof to the contrary. Not one protestant experienced a decline in revenue in 1965 compared to 1963 and 1964. Not one protestant operated at a deficit and all had very favorable operating ratios (6 of the 7 protestants had operating ratios lower than Strickland in each of the three years). In numerous cases, the Commission has stated that protestants must do more than submit conjectural and speculative data to show they would be adversely affected if a transaction is approved. Applicants submit that not only does protestants' evidence fail to substantiate their allegations of adverse effect on them but that the data contained in their own annual reports clearly shows that they would not be so affected by approval of the transactions.

A second contention of protestants is that the evidence requires a finding of dormancy because the England authority was inactive from May 1 to October 5, 1964. It is not disputed that England ceased operations on April 30, 1964. Applicants submit, however, that cessation of operations on that date was because England experienced labor difficulties, that immediately following sale of those rights at public auction on June 17, 1964, at which Strickland was the successful bidder, an application for temporary authority was filed, that upon denial of such application, applicants filed a petition for reconsideration of such denial, which petition resulted in grant of temporary authority, and that operations thereunder were commenced

on October 5, 1964. When a suspension or cessation of operations occurs, the procedures required to be followed by the parties concerned in their efforts to secure final decision by the Commission on an application for temporary authority is necessarily time consuming. Applicants certainly cannot be accused of laxity in their efforts to secure temporary authority herein. Moreover, the period of time (5 months) in which the rights were inactive was a relatively short duration. In applicants' brief are cited cases in which the Commission has approved acquisitions over protestants' contentions of dormancy where rights were inactive for periods of as long as approximately 22 months.

Protestants, in their joint brief and several exceptions, also argue that the application should be denied because the purchase price is excessive. In support of their argument they rely to a great extent on the decision in **Strickland Transportation Co., Inc.—Control—England Transportation Co.**, 85 M. C. C. 549. They infer that the decision in that case denying the application upheld the conclusions of the hearing examiner in his recommended report therein finding the purchase price excessive. Applicants submit that the case cited by protestants affords no basis for passing upon the adequacy of the purchase price in this proceeding. The Commission in that case did not make a finding with respect to whether or not the purchase price therein was excessive but denied the application on other grounds. Furthermore, the agreement in that proceeding was entered into in 1958, and what was reasonable or unreasonable in that year affords no standard of comparison today in view of the upward trend in the national economy over the past several years and the increased and different activities of England between 1958 and 1964.

The England rights were sold at public auction which was attended by a great number of carriers, including

several of the protestants herein. The officers of Strickland, as well as the other bidders, are businessmen in a highly competitive field. None could be accused of deliberately committing their own company to the expenditure of a substantial sum unless they had reasonable assurance of getting value received from such expenditure. It stands to reason that they determined before the auction sale just what the England rights were worth if unified with the operations of their respective companies and that their bids were based on recoupment of the purchase price through unified operations in a reasonable period of time. Their bids forced Strickland to go as high as it did but not beyond what it had determined beforehand what the rights were worth to it. It cannot be denied that under the terms of the transaction Strickland will be able to pay the purchase price without any undue hardship on its financial resources. Applicants submit that Strickland's ability to pay and probability of its recoupment of the purchase price should be the controlling factors in determining the reasonableness of the purchase price.

The division of the England irregular route rights and the re-definition of those rights in terms of regular route authority, in the manner recommended by the examiner, is not a confusing, illogical and impractical carving up of those rights as contended by protestants. Applicants submit that the examiner's proposal is not novel or unique but has been approved by the Commission in numerous cases. See, among others, **Jones Truck Line, Inc.—Purchase—Capitol Freight Lines**, 80 M. C. C. 268, **Blake Motor Lines, Inc.—Purchase—Ryan**, 85 M. C. C. 423, and **Keystone Motor Express, Inc.—Purchase—Hatcher Trucking Inc.**, 101 M. C. C. 216.

Protestants' other issues, as set forth in their joint brief and reiterated in their separate exceptions, relating

principally to the prior jointline operations of England and Strickland and the interest of carrier employees, have been thoroughly analyzed by the examiner in his recommended report. The joint line operations of Strickland and England were carried on with the full knowledge of protestants. Some of the protestants participated in portions of the traffic. All of the protestants participate, to varying degrees, in the practices and procedures which they here condemn. The jointline operations were discussed with local Commission employees and officials before being instituted and were set up by applicants following such discussions and in conformity with the conclusions reached in such discussions. The procedures and practices were proper. Moreover, it would be grossly unfair to applicants to now condemn such practices and procedures (a) as were carried on with full knowledge by the Commission and (2) are standard procedures of protestants as now being retroactively unlawful.

Applicants submit that the examiner's findings therein are sound and should be sustained with the following modification.

One of the conditions imposed by the examiner in recommending approval of the Strickland-England transaction and the transaction referred to in footnote 1 is that both transactions shall be consummated simultaneously and that one may not be consummated unless both are consummated. Applicants request that this condition not be imposed if upon final determination of the proceedings the Strickland-England transaction is approved and the transaction in footnote 1 is denied. The rights are readily divisible in the manner recommended by the examiner and the parties are agreeable to consummating each transaction independently of the other.

Conclusion.

By reason of the foregoing, applicants pray that the Commission adopt the report and order recommended by the examiner in No. MC-F-8798, with the previously discussed modification, and grant the application in No. MC 59680, Sub 142.

Respectfully submitted,

/s/ W. T. Brunson,
W. T. Brunson,
Attorney for Applicants.

Of Counsel:

James L. Smith.

Certificate of Service.

I hereby certify that I have this date served a copy of the foregoing Reply upon all parties of record herein by mailing the same to each such party via prepaid first class mail.

Dated at Oklahoma City, Oklahoma, this 12th day of September, 1966.

/s/ W. T. Brunson,
W. T. Brunson.

APPENDIX B.

Before the
Interstate Commerce Commission.

Re: Strickland Transportation Company, Inc.—Purchase (Portion)—England Transportation Company and Strickland Transportation Company, Inc.—Extension Application.	Docket No. MC-F-8798 Docket No. MC 59680, Sub 142

Petition for Reconsideration and Oral Argument and to Reopen to Receive Tendered Evidence.

Strickland Transportation Company, Inc. and England Transportation Company, joint applicants in the captioned finance proceeding and Strickland Transportation Company, Inc., applicant in MC 59680, Sub 142, hereby petition the Commission for reconsideration of its report and order of July 31, 1967, served herein on August 15, 1967 and reopening of this proceeding for the purpose of receiving the additional evidence tendered simultaneously herewith and for permission to orally argue to the Commission in support of this petition. In support thereof, joint applicants respectfully state to the Commission.

[**Note**: The following portions are omitted: "Statement of the Case," "Basis of Commission's Denial," and "Fifteen Points for Reconsideration," pp. 1-36.]

The applications should be approved, as recommended by the Hearing Examiner, for the reasons:

1.

The operating rights which the Hearing Examiner recommended be approved for transfer to Strickland are not dormant.

2.

The restriction recommended by the Hearing Examiner is sufficiently broad to (a) protect any protestant against any competitive harm or prejudice and (b) the present Strickland rights and the restrictions on the England authority recommended by the Hearing Examiner are adequate to sustain the conclusion that there can be no unlawful cross-haul (through New Orleans) by Strickland after unification.

3.

Unification of the rights will permit Strickland to serve a demonstrated public need with no harm or prejudice to existing carriers.

4.

Need for continuation of and improvement to the existing service has been demonstrated by (a) the operations of Strickland under temporary authority and (b) the testimony and evidence of the supporting shippers.

5.

Approval of the application is in the public interest in that it will permit continuation of and improvement to the existing service without harm or prejudice to the presently well established and strong existing carriers.

6.

Denial of the Strickland and Copperstate applications will not benefit any existing carrier, protestant or applicant. Such denial will undoubtedly result in reinstitution of operations by England.

Copperstate has paid England of Louisiana the agreed consideration for its operating equipment and $30,000.00 for lease of rights, the balance of the Copperstate rental

payments having been allocated to England of Texas. Strickland has paid England $178,200.00 for authority rentals. Deaton has paid England $7,500.00 for the rights it purchased. Therefore, England has received a total of $215,700.00 for authority sales and rentals. It is now financially able to reinstitute operations and to effectively compete in its entire authorized area.

7.

Approval of the applications and subsequent unification of the England rights between New Orleans, on the one hand, and Alexandria, Monroe and Shrevepo t, on the other, with the present rights of Strickland will benefit Strickland in permitting it to economize on its present movements of traffic between New Orleans on the one hand, and its volume traffic points such as St. Louis, Missouri, Chicago, Illinois, Milwaukee, Wisconsin, Detroit, Michigan, Cleveland, Ohio, Philadelphia, Pennsylvania, all of New Jersey, New York, N. Y. and vicinity, all of Connecticut, Springfield and Boston, Massachusetts.

8.

Approval of the applications will be of substantial benefit to the shipping public.

Wherefore, it is submitted that the Commission should reconsider its July 31, 1967 order and after such reconsideration, make and issue its order adopting the recommendations of the Hearing Examiner.

Respectfully submitted,

Strickland Transportation Company, Inc. and England Transportation Company, Joint Applicants,

By /s/ W. T. Brunson,
W. T. Brunson.

Certificate of Service.

I hereby certify that a copy of the above and foregoing has been served on all parties of record in the captioned proceedings by properly addressed, prepaid mail this 22nd day of September, 1967.

/s/ W. T. Brunson,
W. T. Brunson.

BRARY
COURT. U. S.

Office-Supreme Court, U.S.
FILED
APR 17 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1128

CONSOLIDATED COPPERSTATE LINES,
Appellant,

vs.

NITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; GORDONS TRANSPORTS, INC.; BRASWELL MOTOR FREIGHT LINES, INC.; CENTRAL FREIGHT LINES, INC.; RED BALL MOTOR FREIGHT, INC.; SAIA MOTOR FREIGHT LINES, INC.; HERRIN TRANSPORTATION CO.; AND RYDER TRUCK LINES, INC.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

IEF IN OPPOSITION TO MOTIONS TO AFFIRM.

DAVID AXELROD,
ARNOLD L. BURKE,
LEONARD R. KOFKIN,
39 South LaSalle Street,
Chicago, Illinois 60603,
Counsel for Consolidated Copperstate Lines, Inc., Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1128.

CONSOLIDATED COPPERSTATE LINES,

Appellant,

vs.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; GORDONS TRANSPORTS, INC.; BRASWELL MOTOR FREIGHT LINES, INC.; CENTRAL FREIGHT LINES, INC.; RED BALL MOTOR FREIGHT, INC.; SAIA MOTOR FREIGHT LINES, INC.; HERRIN TRANSPORTATION CO.; AND RYDER TRUCK LINES, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM.

Pursuant to Rule 16(4) of the Rules of this Court appellant, Consolidated Copperstate Lines (Copperstate) files this its brief and reply to arguments set forth in Motions to Affirm filed by the various parties hereto.

ARGUMENT.

The Interstate Commerce Commission (Commission) and United States of America (U. S.) assert that appellant's argument concerning the Commission's failure to consider the testimony of public witnesses is a matter of form rather than substance. This same argument is made in various ways by other parties. Even if the Commission considered the evidence of shipper witnesses in determining the question of "need" in the Section 207* case, as is asserted, that does not as is then argued determine the need "in both cases". Under Section 207 "need" is determined in the context of a finding of "public convenience and necessity". In a Section 5** proceeding "need" is determined in the context of a finding of "public interest". These distinctions are statutory, substantive and not matters of form.

There are obvious inconsistencies between the criteria considered by the Commission in determining the issues of "public interest" and "public convenience and necessity" raised in the instant case and in *Consolidated-Control-Southern Plaza,* 104 MCC 194. Contrary to the assertion in the Motion of the Commission and the U. S., possible participation by Consolidated in allegedly violating the Interstate Commerce Act was in fact an issue in that case (see 104 MCC at 210). That was not the only or overriding consideration in the *Consolidated* case and it was arbitrary for the Commission to consider it so in the instant matter.

The reference to Copperstate's "willful and defiant disregard for regulation" is out of context. Prior to making that statement the Commission itself indicates that the illegal operation may have continued for a brief period following the granting of temporary authority and then

---

* 49 U. S. C. § 307.

** 49 U. S. C. § 5.

refers to an inference upon which it then based subsequent findings (J. S. app. 41).

In fact the Commission's discussion of the "willful and defiant disregard for regulation" and of Copperstate's intention to continue unlawful movements is predicated on a single question and answer. It may be appropriate at this point, since so much is made of it and despite the absence of a printed record, to apprise this Court of the source of the finding upon which the Commission has arbitrarily based its entire decision. During the cross-examination of one of Copperstate's witnesses concerning the matter, he was asked:

> "If the purchase application is granted, do you propose to continue that type of operation?
> A. No sir. That is the reason we filed a certificate.
> Q. I said the purchase, just the purchase.
> A. All right.
> Q. Do you propose to continue that sort of operation?
> A. No sir.
> Q. You don't?
> A. No sir". (Transcript p. 746.)

Following that it became apparent that the witness was considering the question in the light of the Sub 21 application. This is clear from the answer "No sir, we would move it from Baton Rouge directly into Houston" (Transcript p. 746). The witness asserted that he would do this under the purchase application alone, but that he was confused about the line of questioning (Transcript p. 747). Finally, the following question was posed, "If the Section 5 application were granted, and you were permitted to purchase the England authority, Louisiana and Texas Companies, do you propose to continue to pick up shipments at Baton Rouge and move them via New Orleans to Houston?" The answer was, "Yes until we get a ruling from the Commission that it's not illegal" (Transcript

p. 747). Further, when asked whether the witness had consulted his counsel as to whether this operation was legal, his answer was, "This didn't come up until the other day. I haven't inquired yet with him, no" (Transcript pp. 747-748). Nowhere did the witness make the statement attributed to him. Instead the record shows that the issue was raised at the hearing for the first time* and that the exchange between the witness and counsel did not evidence any intention to operate in an unlawful manner.

In each motion to affirm it is asserted that the Commission arrives at its decisions on a case by case basis depending upon the facts in each. That of course is proper as a general rule. However, the facts in each case must be weighed in accordance with applicable statutory provisions which clearly differentiate between "public interest" and "public convenience and necessity" and an administrative agency cannot ignore the established criteria for determining each. While facts may change from case to case the statute and criteria to be applied do not. The Commission's decision in the instant matter is arbitrary because that is its effect.

Respectfully submitted,

David Axelrod,
Arnold L. Burke,
Leonard R. Kofkin,
39 South LaSalle Street,
Chicago, Illinois 60603,
Counsel for Consolidated Copperstate Lines, Inc., Appellant.

* In addition this short exchange should be considered in light of the fact that England's management has ostensibly obtained an opinion from a Commission representative which they construed as permitting the operation in question (J. S. App. 78).

PROOF OF SERVICE.

I, David Axelrod, attorney for Appellant Consolidated Copperstate Lines, and a member of the bar of this Court, do hereby certify that I have this day served its Brief in Opposition to Motions to Affirm upon the parties to this action by mailing copies thereof to the Solicitor General, Department of Justice, Washington, D. C. 20530, as service upon the Appellee United States of America; to Robert W. Ginnane, Esquire, General Counsel, Interstate Commerce Commission, Washington, D. C. 20423, as service upon Appellate Interstate Commerce Commission; to Dennis G. Lyons, 1229 Nineteenth Street, N. W., Washington, D. C. 20036, as service upon Strickland Transportation Co., Inc., intervening Plaintiff below; to Phineas Stevens, Esquire, Butler, Snow, O'Mara, Stevens & Cannada, Suite 700, Petroleum Building, Post Office Box 22567, Jackson, Mississippi 39205; and to James Wrape, Esquire, and Robert E. Joyner, Esquire, Wrape and Hernly, 2111 Sterick Building, Memphis Tennessee 38103, as service upon Appellee Arkansas-Best Freight System, Inc., and Gordons Transports, Inc., intervening defendants below; to Reagan Sayers, Esquire, and Clayte Binion, Esquire, Rawlings, Sayers & Scurlock, Century Life Building, P. O. Box 17007, Fort Worth, Texas 76102, attorneys for Appellee Ryder Truck Lines, Inc., intervening defendant below; to Lawrence A. Winkle, Esquire, Braswell Motor Freight Lines, Inc., P. O. Box 3989, Dallas, Texas 75208; and to M. Ward Bailey, Esquire, and T. S. Christopher, Esquire, Christopher & Bailey, 2412 Continental Life Building, Fort Worth, Texas 76102, as service upon Appellee Braswell Motor Freight Lines, Inc., intervening defendant below; to Mert Starnes, Esquire, James, Robinson, Felts & Starnes, The 904 Lavaca Building, Austin, Texas 78701, as service upon Appellees Central Freight Lines, Inc., Red Ball Motor Freight, Inc., and Saia Motor Freight Line, Inc., interven-

ing defendants below; to Leroy Hallman, Esquire, and William E. Livingstone III, Esquire, Phinney, Hallman, Pulley & Livingstone, 4555 First National Bank Building, Dallas, Texas 75202, as service upon Appellee Herrin Transportation Company, intervening defendant below; and to Maurice E. Hibbert, Esquire, and Warren N. Grossman, Esquire, Knapp, Gill, Hibbert & Stevens, 825 City National Bank Building, 606 South Olive Street, Los Angeles, California 90014; to W. D. Beatenbough, Esquire, Vice President-Traffic, Ryder Truck Lines, Inc., P. O. Box 2408, Jacksonville, Florida 32203; to Charles L. Ford, Esquire, Texas Railroad Association, P. O. Box 1767, Austin, Texas 78767; to Rollo E. Kidwell, Esquire, P. O. Box 10125, Dallas, Texas 75207; to Charles D. Matthews, Esquire, P. O. Box 47407, Dallas, Texas 75247; to Hugh T. Matthews, Esquire, Brooks, Montgomery & Matthews, 630 Fidelity Union Tower, 1507 Pacific Street, Dallas, Texas 75201; to Franklin H. Wilson, Esquire, McCutchen, Black, Verleger & Shea, 615 South Flower Street, Los Angeles, California 90017; and to Messrs. Russell & Schureman, 1545 Wilshire Boulevard, Los Angeles, California 90017, as additional service upon various of the aforesaid Appellees, intervening defendants below; and I do further certify that such mailing was made by air mail, postage prepaid, in the case of addressees having addresses other than in Chicago, Ill.

Dated April 16, 1969.

.....

DAVID AXELROD,
Attorney for Appellant Consolidated Copperstate Lines.

Of Counsel:

AXELROD, GOODMAN & STEINER,
39 South LaSalle Street,
Chicago, Illinois 60603.

LIBRARY
REME COURT. U. S.

Office-Supreme Court, U.S.
FILED
APR 16 1969
VIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1141

STRICKLAND TRANSPORTATION COMPANY, INC.,
Appellant,

—v.—

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ARKANSAS-BEST FREIGHT SYSTEM, INC., GORDONS TRANSPORTS, INC., BRASWELL MOTOR FREIGHT LINES, INC., RED BALL MOTOR FREIGHT, INC., HERRIN TRANSPORTATION CO., and CONSOLIDATED COPPERSTATE LINES,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

DENNIS G. LYONS
1229 Nineteenth Street, N. W.
Washington, D. C. 20036
Attorney for Appellant

April, 1969

Of Counsel:

JOE A. KEITH
Sherman, Texas

W. T. BRUNSON
Oklahoma City, Oklahoma

ARNOLD & PORTER
Washington, D. C.

INDEX

PAGE

I. The Shreveport-New Orleans Rights 1

II. The Monroe-New Orleans Rights 13

CONCLUSION 15

CITATIONS

CASES:

Aetna Freight Lines, Inc.—Control—Ray Carter, 109 M.C.C. 13 (1969) 11

Baltimore & O. R. Co. v. Aberdeen & R. R. Co., 393 U.S. 87 (1968) 5

Campbell Sixty-Six Express Inc. v. Frisco Transportation Co., 81 M.C.C. 53 (1959) 9

Consolidated Copperstate Lines—Purchase—Sunset Motor Lines, 85 M.C.C. 113 (1960) 3, 4

Dealers Transit, Inc.—Control and Merger—William Corbitt, Inc., 93 M.C.C. 611 (1964) 9

Deaton Truck Lines, Inc.—Purchase—Lavendar, 97 M.C.C. 256 (1964), *aff'd sub nom.* Alabama Highway Express, Inc. v. United States, 241 F. Supp. 290 (N.D. Ala. 1965), *aff'd*, 382 U.S. 106 (1965) 2-3, 4

Ex parte No. MC-43, Lease and Interchange of Motor Vehicles, 51 M.C.C. 461 (1950), 52 M.C.C. 675, 64 M.C.C. 361, 68 M.C.C. 553, 79 M.C.C. 65, 79 M.C.C. 251, 84 M.C.C. 247 ..... 4, 6

Ex parte No. 230, Piggyback Service, 322 I.C.C. 301 (1964) 5

PAGE

Gilbertville Trucking Co. v. United States, 371 U.S. 115 (1964) 4
Gordons Transports, Inc. v. Strickland Transportation Co., 381 I.C.C. 395 (1962) 6

Motor Common Carriers of Property—Routes and Service, 88 M.C.C. 415 (1961) 12

Refrigerated Foods, Inc.—Purchase—Denver-Pacific Express, 109 M.C.C. 42 (1969) 11
Roadway Express, Inc.—Extension—Birmingham, Dallas, Houston, 82 M.C.C. 689 (1960) 11

Tank Lines, Inc.—Purchase—S.N. Freight Line, Inc., 90 M.C.C. 381 (1962) 9
The Stewart Co., Investigation, 87 M.C.C. 681 (1961) 9

INTERSTATE COMMERCE ACT:

Section 5, 49 U.S.C. § 5 ..... 10, 11

Section 207, 49 U.S.C. § 307 ..... 10, 11

STATUTES AND RULE:

49 C.F.R. § 1057.5(c) 3

OTHER AUTHORITY:

Booth, *Motor Carrier Leasing Regulations of the Interstate Commerce Commission* (1964 ed.) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1141

STRICKLAND TRANSPORTATION COMPANY, INC.,

Appellant,

—v.—

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ARKANSAS-BEST FREIGHT SYSTEM, INC., GORDONS TRANSPORTS, INC., BRASWELL MOTOR FREIGHT LINES, INC., RED BALL MOTOR FREIGHT, INC., HERRIN TRANSPORTATION CO., and CONSOLIDATED COPPERSTATE LINES,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

I. The Shreveport-New Orleans Rights

As the Government points out (Motion, p. 6), the central issue on which the Commission denied the purchase application with respect to the Shreveport rights was because those rights were "constructively dormant" since "England had exercised these rights almost exclusively for the 'interchange' arrangement with Strickland, which it [the Commission] found to have been, in effect, an unlawful assump-

tion of the rights by Strickland." [1] Thus, the central issue on which the Commission's order in this respect must stand or fall is whether the Strickland-England interchange was properly found to be unlawful. (Contrary to the contentions of some of the private appellees (see Herrin Motion, pp. 8-9), it is *not* Strickland's position on this appeal that the interchange might have been unlawful but that the unlawfulness should be excused.)—However, we note that there are certain other manifest errors of the Commission, on which its decision may well have turned, which the Government makes no effort to defend. In this category are the Commission's error in assuming that Strickland had admitted that the interchange arrangements were "novel" (J.S. p. 17 n. 13, 24), and the Commission's apparent partial reliance on its two prior decisions involving Strickland, rendered in 1958 and 1962, in determining what action to take with respect to the instant application. (See note 1, *supra*)

1. The Government's discussion (Motion, pp. 6-7) of the aspects in which the interchange is said to have been unlawful has been largely anticipated and dealt with in detail in our Jurisdictional Statement, pp. 27-34. In this category we put such red herrings as the question of the ownership of the trailers;[2] the basis of compensation and

---

[1] The Government cannot resist the temptation to refer (Motion, p. 5) to two prior Commission decisions adverse to Strickland rendered in 1958 and 1962. For a fuller treatment of these decisions and their lack of adverse implication to the present case, see J.S. pp. 6-8, and n. 4. Certain of the private appellees also rehash these earlier decisions. (Arkansas-Best *et al.*, Motion, pp. 19-20.)

[2] As we pointed out in the Jurisdictional Statement (pp. 30-31) in promulgating the interchange rules in 1951 the Commission expressly rejected a suggestion that an "ownership" requirement be imposed upon equipment used. Indeed, in *Deaton Truck Lines,*

the claim of violation of 49 C.F.R. § 1057.5(c);[3] the fact that the shipments moved on Strickland's bills;[4] the alleged freedom from damage claims on England's part;[5] and the use of loaded and sealed trailers.[6] All these incidents are

---

Inc.—Purchase—Lavendar, 97 M.C.C. 256 (1964), *aff'd sub nom. Alabama Highway Express, Inc.* v. *United States*, 241 F. Supp. 290 (N.D. Ala. 1965), *aff'd*, 382 U.S. 106 (1965), the Commission sanctioned an interchange where *all* the trailers belonged to one party.

[3] See our discussion of this point in the Jurisdictional Statement, pp. 27-31. The interchange approved in the *Deaton* case involved identical intercarrier financial arrangements. *Deaton* Tr., pp. 38-39. See also Booth, *Motor Carrier Leasing Regulations of the Interstate Commerce Commission* (1964 ed.), p. 42, which makes it clear that interchange agreements may provide that the consideration for the use of equipment is the surrender of other equipment.

[4] This practice is required by the Commission's own rules. See 49 C.F.R. § 1057.5(c); J.S., p. 49a. The standard handbook on the interchange rules admonishes the industry to employ this practice. Booth, *Motor Carrier Leasing Regulations of the Interstate Commerce Commission* (1964 ed.), p. 42. The cases reveal this to be the industry practice, to which the Commission takes no exception. See *Deaton Truck Lines, Inc.—Purchase—Lavendar, supra; Consolidated Copperstate Lines—Purchase—Sunset Motor Lines*, 85 M.C.C. 113 (1960). The Commission, as we pointed out in our Jurisdictional Statement (pp. 31-32), simply erred in its assertion that it was a frequent occurrence for England's participation as an interchange partner not to be noted on the bills.

[5] Unable to answer Strickland's point that the Commission itself has approved identical indemnification arrangements and that the arrangement accorded with the practicalities of the matter (J.S., at p. 33), the Government lamely suggests that a brief colloquy in the record here establishes a contrary "general rule" in the industry. (Motion, p. 6.) Not only is this grossly inadequate evidence of industry practice, but the Government fails to explain how departure from industry practice—if it were so—can be equated with unlawfulness.

[6] Of course, there is nothing in the Commission's regulations requiring the contents of trailers to be unloaded from them and shuffled around at interchange points. That such a "feather-bedding" practice is essential to a valid interchange has never before been suggested. Clearly if it is in the public interest for motor carriers to interline and interchange freight "without unloading"—and the Commission has said it is (see p. 6, *infra*)—this

perfectly consistent with a lawful interchange, and indeed many of them, as we pointed out, have been expressly approved by the Commission and appear to be necessary incidents of an efficiently run interchange.—While the Commission may change its rules regarding motor carrier interchange, and has frequently done so in formal proceedings for amendments to the leasing and interchange rules (see, *e.g.*, the further proceedings in *Ex parte No. MC-43, Lease and Interchange of Motor Vehicles,* reported at 52 M.C.C. 675, 64 M.C.C. 361, 68 M.C.C. 553, 79 M.C.C. 65, 79 M.C.C. 251, and 84 M.C.C. 247), the Commission did not purport to amend its interchange rules here; it purported only to be applying them.[7] Those rules are as binding on the agency as on the citizen. See, *e.g.*, *Service* v. *Dulles,* 354 U.S. 363 (1957).

---

should be accomplished with as much expedition as possible, and the use of loaded and sealed trailers is certainly conducive to this. See also *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, 121 n. 2 (1964), noting the advantages of interchanging loaded trailers. We would point out that this practice was involved in the interchanges involved in *Consolidated Copperstate Lines—Purchase—Sunset Motor Lines, supra,* and *Deaton Truck Lines, Inc.—Purchase—Lavendar, supra,* and was not challenged by the Commission in either case.

[7] The Commission's approval of the transfer application in *Deaton Truck Lines, Inc.—Purchase—Lavendar, supra,* furnishes an interesting contrast to its action in the case at bar. In that case Deaton, a long-haul carrier, had twice before attempted to bridge a small gap in its operating rights between certain southern cities and Memphis. Each time the Commission rebuffed the attempts. After Deaton acquired an option to purchase certain of Lavendar's rights, the two carriers entered into an interchange agreement under which Lavendar's two drivers and tractors were to transport Deaton's fully-loaded trailers over a short segment between Nesbitt and Memphis. Lavendar was paid a flat fee of $20 per movement, later reduced to $17.50. Deaton collected all revenues from shippers. No attempt to show public convenience and necessity was made; the entire reliance, in the transfer application filed by the parties, was on the interchange arrangement as showing lawful use of the rights. Various competing carriers;

The only new specific suggestions by the Government as to why the interchange might be deemed unlawful are without substance; moreover, they were not mentioned in the Commission's report, and, accordingly, could not be a basis for affirming that report in any event. See, *e.g.*, *Baltimore & O. R. Co.* v. *Aberdeen & R. R. Co.*, 393 U.S. 87, 91-92 (1968). For what they are worth, these new suggestions of illegality are:

(a) The suggestion that the interchange was unlawful because, in the example of a southbound movement, after the freight was interchanged between Strickland and England at Shreveport, it was reinterchanged by England to Strickland at New Orleans for local delivery. It is undisputed that Strickland had unlimited rights, including local delivery rights, in New Orleans. This practice, which is also complained of by appellees Arkansas-Best *et al.* (Motion, pp. 17-18), is clearly no more than the exercise of the power of an originating carrier, absent contrary shipper directions, to control the subsequent routing of the movement. Clearly, there is no reason why Strickland should have "shorthauled" itself in routing the traffic by denying itself of its power to make local deliveries of shipments in New Orleans. See *Ex parte No. 230, Piggyback Service*, 322 I.C.C. 301, 342 (1964), for the sanctioning of this practice in a related context; see also *id.*, at 358-60.

(b) The Government also suggests that the interchange was unlawful because it bridged a gap in Strickland's

---

including the present appellee, Gordons Transports, Inc., opposed. The Commission found no defects in the interchange, despite a flat-fee arrangement, the ownership of *all* trailers by one partner, the use of loaded trailers, the exclusive billing by Deaton, the history of Deaton's unsuccessful attempts to gain entry to Memphis, and the fact that the interchange, which was commenced only after the option was granted, was the *sole* activity of Lavendar over the route. The Commission's report was affirmed by a District Court and by this Court. See note 2, *supra*.

authority. But the basic purpose of interline and interchange between motor carriers is to permit a through movement of freight over a route which neither could serve under its separate authority. It is the Commission's stated policy: "That interchange between common carriers, in order to promote through movement of traffic without unloading, where feasible should be encouraged." *Ex parte No. MC-43,* 51 M.C.C. 461, 530 (1950). The further, related suggestion that the "service England provided was in no respect different from that which Strickland had previously sought to arrange unlawfully with the railroad" ignores the fact that the matter referred to, *Gordons Transports, Inc.* v. *Strickland Transportation Co.,* 318 I.C.C. 395 (1962), was decided under principles then applied by the Commission to "piggyback" carriage involving motor carriers and rail carriers; *Gordons* tells us nothing as to the legality of an all-motor carrier interchange.[8]

(c) The Government suggests (Motion, p. 8 n. 6) that the interchange agreement between Strickland and England violates 49 C.F.R. § 1057.5(a) in that it does not identify the vehicles, points of interchange, and the consideration. The agreement, set out at J.S. p. 53a, does in fact disclose the consideration. See paragraph 4, J.S. p. 55a. See also J.S. pp. 27-29. And this agreement, precisely as does the model Equipment Interchange Contract published for its members by the Equipment Interchange Association, employs the interchange receipt and

[8] As we pointed out in the Jurisdictional Statement (p. 7, n. 4) these principles were subsequently extensively revised. As the Government admits (Motion, p. 5, n. 5), in the *Gordons* case the Commission never passed on the *present* validity, under current rules of law, of the old "piggyback" carriage with the Illinois Central once employed by Strickland, and that decision is "not decisive as to the all-motor operations now in question." (*Ibid.*)

safety inspection report executed upon each interchange to supply the requisite detail as to vehicles and interchange points. See Equipment Interchange Association, Form EIC-1, revised July 1, 1968. If the Strickland-England agreement is unlawful for the reasons stated by the Government, the form used throughout the industry is likewise unlawful. We believe it is the Government which is in error in suggesting this new alternative basis for the Commission's action.

(d) The Government finally suggests (Motion, p. 7) that the freight volume moved by England apart from the interchange was not substantial. Its statistics are somewhat misleading.[9] In any event, the amount of other England traffic scarcely affects the legality of the interchange, whatever effect it might have on the question whether, if the interchange were found unlawful, England's rights should be found to be constructively dormant.[10]

---

[9] The Government's reference is to a set of exhibits which excluded all of England's intrastate traffic and included only a portion of England's interstate traffic. An exhibit submitted by the appellants (Exhibit 40) which undertook to reflect all the interstate traffic handled by England during a six-months' period which was relevant to the rights contracted for by Strickland, indicated that approximately 25% of the traffic consisted of interstate traffic other than traffic handled in the Strickland-England interchange. Apart from the interchange movement, England operated a daily movement between New Orleans and Shreveport. (Examiner's Report, p. 21) Approximately 30% of England's 1963 revenues relevant to the operating rights contracted for by Strickland resulted from England's operations other than under the interchange arrangement. (Examiner's Report, p. 13)

[10] Certain of the private appellees attempt to reply (as the Government does not) to our argument that the basis on which the Commission's decision was rendered came as a procedural surprise to Strickland. While some of them assert (see Arkansas-Best *et al.*, Motion, p. 18) that the dispositive issues were injected in the case earlier than the Commission's Report, none of them furnishes any specific citation or quotation to show that the matters on which the Commission's Report turned actually were at issue at the time of the hearing. None of the appellees explains

2. The Government next suggests that the questions presented by the appeal with respect to the New Orleans-Shreveport rights are "basically factual." If the Commission had managed to articulate a standard of illegality in this case and the question was whether a party behaved in such a way as to violate the standard, we might agree. But here the question is: What is the standard which Strickland is supposed to have violated? Why was its conduct held unlawful, and does any of its admitted behavior constitute a violation of any provision of law, rule or regulation? As the motions to affirm by their silence indicate, the answer is none. Clearly the question of what legal standard Strickland is supposed to have violated is a question of law.[11]

Perhaps somewhat embarrassed by the lack of any specific violation on Strickland and England's part of any identifiable law, rule or regulation, the Government is moved to generalities. We are platitudinously reminded that "ostensible compliance with technical requirements does not preclude a finding of illegality." (Motion, p. 7) This may be so, but it still does not answer the question of how it was that Strickland and England are said to have acted unlawfully in their interchange.[12] As we pointed out

---

why the four dissenting members of the Commission stated that the case was "being decided, at least to a great extent, upon technicalities or issues not raised by the parties." 104 M.C.C. at 327; J.S., p. 38a.

[11] Indeed, the protesting carriers made the point during the hearings that: "In the main, the factual considerations involved in these proceedings are undisputed. . . . " Joint Brief of Protestants Before Hearing Examiner, p. 16. To the same effect, see various of the Exceptions to Examiner's Report and Recommended Order, Braswell, p. 1; Arkansas-Best, p. 1; and Gordons Transports, p. 1.

[12] Another rhetorical device used by Arkansas-Best *et al.* is to assert (Motion, p. 16) that in fact "there was no interchange." As usual, we are not told why.

at length in the Jurisdictional Statement, the specifics in which the arrangements were attacked appear to consist of common practices in the interchange and leasing of motor vehicles among common carriers, most of which have been indeed affirmatively sanctioned by the Commission. Surely the technique of repeatedly calling the interchange a "device" and the repetition of the conclusion that it is unlawful does not make it so.[13] The authorities cited by the Government (Motion, pp. 7-8) do not involve arrangements similar to the interchange at bar, which we presume the Commission realized, since it did not cite them.[14] Since

---

[13] In a circular argument, appellees Arkansas-Best *et al.*, say that it was not the illegality of the interchange on which the Commission's decision proceeded, but rather that Strickland and England were allegedly found unfit (Motion, pp. 13-14). However, the primary subject of the Commission's discussion of their fitness was the matter of their having run an allegedly unlawful interchange.

[14] The cases cited by the Government in its Motion—and not relied on by the Commission, we hasten to repeat—involve obvious sham operations, in which, characteristically, one carrier used its own drivers and motive power to transport shipments over the routes of the other. Thus, in *Campbell Sixty-Six Express Inc.* v. *Frisco Transportation Co.*, 81 M.C.C. 58 (1959), the lessee under an alleged lease agreement permitted the alleged lessor to use its own drivers and tractors over its routes; the lessee's involvement in the movement of traffic was never referred to on the bills of lading; and neither was equipment exchanged nor were there lease charges paid by the lessee. In *The Stewart Co., Investigation*, 87 M.C.C. 681 (1961), once again, the originating carrier's drivers and tractors were used in the entire movement; the alleged interchange partner had no equipment whatsoever; all driver compensation and fringe benefits were paid by the originating carrier; and the alleged interchange partner devoted no personnel whatsoever to the interchange. In *Tank Lines, Inc.—Purchase —S.N. Freight Line, Inc.*, 90 M.C.C. 381 (1962) one carrier used its own drivers and motive power over the routes of the other as an alleged "lessor" and solicited freight movements for which it was not originating carrier. It claimed to operate on its own routes in one direction and to be a "lessor" on the back-haul. In *Dealers Transit, Inc.—Control and Merger—William Corbitt, Inc.*, 93 M.C.C. 611 (1964), once again, the alleged lessor's drivers and tractors were used, the senior personnel of the supposed lessee

the Commission did not proceed on this theory, even if this line of cases were relevant, it would not be proper to affirm the Commission's decision on this basis.

3. In sharp distinction to the Government's approach is that of the only private appellees who have filed more than a pro forma motion, Arkansas-Best *et al.* Perhaps embarrassed by the lack of support for the conclusion of the Commission as to the illegality of the interchange, these appellees—contrary to the Government and to the obvious import of the Commission's report itself—assert that the question of the legality of the interchange "was not essential to the Commission's denial of the applications." (Arkansas-Best *et al.*, Motion, p. 14) These private appellees contend that the basic question has to do with the Commission's finding that Strickland failed to prove "public convenience and necessity" under its application. This fallacious contention is repeatedly asserted. See Arkansas-Best *et al.*, Motion, pp. 12, 14-15.

We do not contest, for the purposes of this appeal, the Commission's rejection of the contingent Section 207 application to serve between Shreveport and New Orleans filed by Strickland—under which public convenience and necessity would have to have been shown. See J.S., p. 11 and n. 7. This application was contingent upon approval of the purchase application filed under Section 5 of the Act.

---

were ignorant of the details of the operation, the "lessee" had no control over the drivers or the equipment, and the lessor solicited traffic with respect to which the lessee was originating carrier. In contrast, as we pointed out in our Jurisdictional Statement (p. 34), England here did everything that a "bridge" carrier in an interchange could do; it utilized its own tractors, drivers, safety inspectors and office personnel; it maintained and operated its own tractor terminals; its employees were solely responsible to it; and its drivers transported the interchanged trailers over its own routes and using its own motive power.

As the Government admits, the basic issue in this case in its present posture is whether the Shreveport-New Orleans rights were constructively dormant on the ground that the only substantial user of them was through the unlawful interchange (Government Motion, pp. 5-6). If the rights were not dormant, as the Government indicates, there was no requirement for Strickland "to demonstrate public need." (Motion, p. 6)[15] Of course, it is well established that interchange use of rights is sufficient to demonstrate that they are not dormant and to obviate the requirement of making a fresh showing of public convenience and necessity. See the cases cited in J.S., p. 21 n. 1, and the recent case of *Aetna Freight Lines, Inc.—Control—Ray Carter*, 109 M.C.C. 13 (1969).[16]

Thus, the private appellees Arkansas-Best *et al.* simply turn matters on their heads when they claim that when the Section 207 application "fell for lack of proof, the corresponding Section 5 application fell." It was the Section 207 application which was contingent upon approval of the Section 5 application, not vice versa.[17] Our position

---

[15] As the Government admits (Motion, p. 3) it is only where the proposal involves a service different from that lawfully performed by the vendor that public convenience and necessity need be shown.

[16] Indeed, in the latter case the interchange was conducted only after negotiation of the purchase contract. For other cases of the Commission taking a radically different view of what constitutes dormancy from the instant case, see, *e.g.*, *Refrigerated Foods, Inc.—Purchase—Denver-Pacific Express*, 109 M.C.C. 42 (1969); *Roadway Express, Inc.—Extension—Birmingham, Dallas, Houston*, 82 M.C.C. 689, 703 (1960).

[17] There is also a suggestion in the Arkansas-Best *et al.* Motion that under no circumstances could the Commission have approved the application because the intent of Strickland was to use the England irregular-route authorities involving New Orleans-Shreveport to perform regular-route services between New Orleans

is that the Commission erred in denying the Section 5 transfer application, which did not require a fresh showing of public convenience and necessity.

---

and Shreveport, which would have been unlawful. The short answer is that the Commission did not so find; its decision is based solely upon the illegality of the interchange and it must stand or fall on that basis. These appellees also assert that under the arrangements which were first worked out administratively and now judicially pending final adjudication, under which Strickland has leased certain of England's rights, Strickland is brazenly performing unlawful regular-route movements. If this is so, it is strange that the Commission approved the arrangements and that it has taken no action with respect to Strickland. We would point out that at the hearing the charge was made that Strickland unlawfully conducted regular operations using irregular route authority (104 M.C.C., at 310, J.S., p. 21a) but the Commission did not take any action with respect to this charge. See 104 M.C.C., at 318, J.S., p. 29a. Accordingly, the Commission's decision cannot be defended on the ground that Strickland has performed, or is apt to perform, regular route transportation using irregular route authority.

As the Commission said in *Motor Common Carriers of Property—Routes and Service,* 88 M.C.C. 415, 431 (1961), "It is 'impossible to propound a general rule by which the regular—or irregular—route character of all operations may be determined, for too much depends upon the peculiar characteristics of each operation and the surrounding circumstances.'" The issue before the Commission was whether it should grant the transfer application. If once the transfer application was granted Strickland were improperly to use the transferred authority, the Commission certainly is not without its remedies. Thus, not only do Arkansas-Best *et al.* try to bottom the Commission's decision on a ground on which it did not proceed, but they seek to draw black and white lines about a matter which is not black and white and as to which, assuming Strickland is permitted to acquire England's authority, the Commission has power to prosecute any violation.

II. The Monroe-New Orleans Rights.

1. Both the Government (Motion, pp. 8-9) and Arkansas-Best *et al.* (Motion, pp. 25-26) contend that the Commission did, in fact, pass on Strickland's application as filed, and did not, as we contend in the Jurisdictional Statement (pp. 35-36) simply pass on the Examiner's unsolicited proposal that the New Orleans-Monroe rights should be transferred only if converted into regular-route authority (Strickland having never filed any application for such conversion). However, the very sentence of the Commission's report quoted by the Government (Motion, p. 9) and obviously referred to by Arkansas-Best *et al.* (Motion, pp. 25-26) is one rejecting the transfer of the New Orleans-Monroe rights upon their "*conversion* to a link in its [Strickland's] long line regular routes." (Emphasis supplied) But Strickland's proposal was for the transfer of those rights as irregular-route authority; it was the Examiner who had recommended their conversion. Thus, the fact remains that the Commission has never passed upon Strickland's application as filed, as Strickland was entitled to have it do.

2. Appellees Arkansas-Best *et al.* say that Strickland may not urge this point because it did not take exception to the Examiner's Report. It is claimed that Strickland, in effect, abandoned its original application and elected to stand on an application which it never filed—one to acquire the rights in question only if converted to regular route authority. Of course, Strickland did no such thing. It did not take exception to the Examiner's Report, since that report granted the transfer application, although converting the authority in question to regular route authority. But Strickland never consented to the Commission's fail-

ure, if it elected to reverse the Examiner's Report, to pass upon Strickland's application as originally filed. Virtually all the other parties took exception to the Examiner's conversion of the rights in question to a regular route authority between New Orleans and Monroe. Certainly Strickland was entitled to rely upon their exceptions and to assume that if the Commission agreed with them it would then pass upon its application as originally filed.

Certain of the appellees (*e.g.*, Herrin Motion, pp. 10-11) urge that it would have been impossible for the Examiner or the Commission to have granted the transfer application with respect to movements New Orleans-Monroe absent a conversion. The short answer is that neither the Examiner nor the Commission ever said so; clearly the Commission's action cannot be sustained on the theory that if it had passed on Strickland's application as filed it would have to have denied it, since the Commission did not pass on the application as filed and never indicated whether it would have granted it if it had done so.

* * * * *

The Commission, then, in this case, has held unlawful interchange operations complying in every respect with the Commission's own rules on lease and interchange of vehicles by motor carriers, and with the Commission's own prior pronouncements as to proper interchange practices; interchange operations which embodied practices which are common to the industry and in many cases necessary to an efficient interchange. The perfunctory and unsatisfactory character of the Government's attempts to justify the Commission's holding of illegality—and the unfounded assertions by the private appellees (contrary to the Government's admission) that the legality of the interchange is not central to the Commission's order—serve to underline the importance of plenary review of

the Commission's decision by this Court. Moreover, with respect to the Monroe-New Orleans rights, the record indicates a serious procedural failure on the part of the Commission, prejudicial to Strickland's rights, which the motions to affirm have not dispelled.

CONCLUSION

For the reasons stated in our Jurisdictional Statement and herein, probable jurisdiction should be noted.

Respectfully submitted,

DENNIS G. LYONS
1229 Nineteenth Street, N. W.
Washington, D. C. 20036
Attorney for Appellant

April, 1969

Of Counsel:

JOE A. KEITH
Sherman, Texas

W. T. BRUNSON
Oklahoma City, Oklahoma

ARNOLD & PORTER
Washington, D. C.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

CONSOLIDATED COPPERSTATE LINES *v.* UNITED STATES ET AL.; and

STRICKLAND TRANSPORTATION CO., INC. *v.* UNITED STATES ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

Nos. 1128 and 1141. Decided April 21, 1969.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE FORTAS took no part in the consideration or decisions of these cases.